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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CITY OF ANAHEIM,
Petitioner,

vs.

CALIFORNIA CREDIT UNION LEAGUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under 12 U.S.C. § 1768, the City of Anaheim can constitutionally levy its transient occupancy tax upon employees of federal credit unions when the employee occupies a hotel or motel room on credit union business and the employee pays the hotel with a credit union check advanced by the employer.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were petitioner City of Anaheim and respondent California Credit Union League.[1]

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[1] *Amici curiae* briefs were filed in the court of appeals below. Fifty cities joined in a brief filed by the National Institute of Municipal Law Officers in support of petitioner City of Anaheim and the Credit Union National Assoc. Inc., joined by the Hawaii Credit Union League, National Association of Federal Credit Unions and United States Government filed briefs in support of respondent California Credit Union League.

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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

CITY OF ANAHEIM,
Petitioner,
vs.
CALIFORNIA CREDIT UNION LEAGUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 95 F.3d 30 and is attached hereto as Appendix A. The United States District Court's order denying motion to dismiss and granting summary judgment is attached hereto as Appendix B; and the judgment is attached hereto as Appendix C.

JURISDICTION

The court of appeals entered its judgment on September 9, 1996 (App. A). This petition is filed within 90 days of entry of judgment pursuant to 28 U.S.C. § 2101(c) and United States Supreme Court Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The principal statutory provision involved in the case is ~~12~~ U.S.C. § 1768. The provision of the statute is included *verbatim* in Appendix D1 and the pertinent portion quoted below:

> "The Federal credit unions organized hereunder, their property, their franchises, capital, reserves, surpluses, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property of such Federal credit unions shall be subject to . . . taxation to the same extent as other similar property is taxed. . . ."

STATEMENT OF THE CASE

1. This case concerns the relationship between the City's transient occupancy tax ("TOT tax") and 12 U.S.C. § 1768, which confers on federal credit unions broad immunity from federal, state, and local taxation.

The issue here is whether the City of Anaheim can constitutionally impose its TOT tax upon employees of federal credit unions when the employee is on credit union business (as evidenced by an exemption form) and the credit union pays the hotel directly through a credit union check. Although 12 U.S.C. § 1768 exempts a credit union, it does not exempt the credit union's employees from the transient occupancy tax which is

imposed on the occupant of the room, the employee, not the employer. 75 Ops.Cal.Atty.Gen. 86 (1992). To hold otherwise would deprive cities across the nation of significant revenue to pay for the local services provided to transients.

2. In November 1993, two dozen federal credit unions sent their employees to attend a credit union conference at the Disneyland Hotel in the City of Anaheim. The Disneyland Hotel assessed the employees a transient occupancy tax pursuant to the Anaheim Municipal Code Chapter 2.12 (attached hereto as Appendix E). These employees sought an exemption from payment of the transient occupancy taxes all the while having used City services such as streets, police, fire and paramedic protection.

3. On September 1, 1994, plaintiff the California Credit Union League (hereinafter "California Credit" or "Credit Union") filed a complaint against the City of Anaheim in the United States District Court for the Central District of California. The lawsuit alleged a violation of 12 U.S.C. § 1768.[2] The complaint prayed that the court enter a declaratory judgment that all federal credit unions are not liable for the payment of hotel occupancy taxes levied by the City of Anaheim, where the hotel rooms triggering the hotel occupancy taxes have been contracted for in the name of federal credit unions, and said rooms have been paid for directly by federal credit unions.

The defendant City of Anaheim (hereinafter "the City") filed a motion to dismiss for failure to state a

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[2] *California Credit Union League v. City of Anaheim*, Case No. CV 94-5991 ER (GHx). The complaint invoked the district court's jurisdiction under 28 U.S.C. § 1331 as well as a federal question under 12 U.S.C. § 1768 (taxation of federal credit unions).

claim upon which relief can be granted. The motion requested an order dismissing the action on the grounds that, as a matter of law, the City of Anaheim can properly levy a TOT tax upon a federal credit union employee who, while on federal credit union business, contracts for a hotel room and submits payment for the room with a check issued by a federal credit union.

The Credit Union filed its opposition to defendant City of Anaheim's motion to dismiss and a motion for summary judgment, which was granted.

The dispute is over whether the City of Anaheim levies the TOT tax against the employees or the federal credit union. The district court erred when it held that the tax was levied against the federal credit union and not the individual employees when they are occupying the hotel on their employer's business. (App. F)

In its oral ruling (App. F4), the district court made various holdings, including:

- that the law is that to resist the state or any governmental entity's taxing power, the private taxpayer must actually stand in the government's shoes. This comes from the Supreme Court in the case of *United States v. New Mexico*. (App. F4).
- that the federal credit union employees occupy a space in the hotel under the facts of this case because the government as an entity cannot physically occupy such space. The only way the credit union can occupy the hotel room is because one of its employees does. There is no way for the credit union to occupy a hotel room. Their interest in renting the room is not separate from their employees' interest. (App. F4).

- that, unlike *United States v. Montgomery County*, 761 F.2d 998 (4th Cir. 1985) and other cases relied upon by the City, the legal incidence of the tax falls on the credit union as their employer, not on the employees. The credit union does not occupy hotel rooms, only its employees do. (App. F4).
- that the City has the right to demand proof in the form of a certificate of exemption in order to grant a tax exemption. The City of Anaheim can fashion a certificate of exemption to its satisfaction to have the employees fill out and sign claiming that they are there on government business in order to qualify for the tax exemption. (App. F6, F8).

4. On appeal, the Ninth Circuit affirmed the district court judgment. The crux of its ruling, based upon *United States v. New Mexico* (1982) 455 U.S. 720, was "that federal employees are constituent parts of the United States, at least with respect to their professional duties." (App. A5). The Ninth Circuit held that "[b]ecause the federal credit unions' employees were attending to credit union business while staying at the Disneyland Hotel [in Anaheim], they were 'constituent parts' of the credit union and immune from Anaheim's transient occupancy tax under Section 1768." (App. A5). The court of appeals held that to avoid paying state or local taxes, "a private taxpayer must actually stand in the Government's shoes." (App. A4). The court of appeals noted that independent of the protection afforded by Section 1768, courts have generally considered federal credit unions to be instrumentalities of the federal government and thus immune from state taxation under the supremacy clause. (App. A3).

Without a discussion of the only federal case on point, the Ninth Circuit ignored the Court of Appeals decision in *United States v. Montgomery County*, 761 F.2d 998 (4th Cir. 1985) which utilized the dictionary meaning of the word "transient" in holding that a county tax on transients renting hotel sleeping accommodations fell on the occupants of the sleeping accommodations [who were outpatients at the National Institutes of Health ("NIH") an instrumentality of the federal government], and not on the NIH which reserved and paid for the rooms, even though the term was defined in the statute imposing a tax on all transients renting hotel sleeping accommodations. A federal credit union, "or the United States Government which arranges a room for a month . . . which is occupied by any . . . *employee* . . . simply does not meet the definition of 'transient.' " *United States v. Montgomery County*, 761 F.2d 998, 1001 (4th Cir. 1985).

The practical effect of the Ninth Circuit's opinion is to permit all federal credit union and federal employees to stay in hotels in any city without paying a TOT tax while they are on business. It is estimated that a total of approximately $100,000 will be lost annually to the City of Anaheim in TOT tax revenue if the Ninth Circuit decision stands. This case involves a question of exceptional national importance for all cities that depend on this revenue to fund vital local services like police and fire protection.

REASONS FOR GRANTING THE PETITION

Not only is the Ninth Circuit decision a mutation of the Fourth Circuit's precedent in *United States v. Montgomery County*, 761 F.2d 998 (4th Cir. 1985), it is contrary to the plain language of the Anaheim Municipal Code. A federal credit union, which arranges a room which is occupied by any *employee* simply does not meet the definition of "transient."

"Since the tax falls on the transient, the occupant of the sleeping accommodations, the fact of reimbursement by the [federal credit union] . . . does not invalidate it under the supremacy clause." *United States v. Montgomery County*, 761 F.2d 998, 1002 (4th Cir. 1985) citing *United States v. New Mexico*, 455 U.S. 720, 735, 102 S.Ct. 1373, 1383, 71 L.Ed.2d 580, 592 (1982)("immunity cannot be conferred simply because the tax is paid with Government funds . . . where the contractor made expenditures under an advanced funding arrangement similar to the one involved here.") The federal credit union's voluntary agreement to reimburse, or even fund in advance, an employee for TOT taxes does not make the federal credit union's payments direct disbursements of federal credit union funds to the City.

I.

THE NINTH CIRCUIT DECISION IS AN UNWARRANTED EXTENSION OF THIS COURT'S PRECEDENTS

Only two federal cases on collecting taxes from federal employees were discussed by the Ninth Circuit opinion. In *United States v. County of Fresno* (1977) 429 U.S. 452, 97 S.Ct. 699, 50 L.Ed.2d 683, this Court

held that the State of California could collect a property tax from United States Forest Service employees for their possessory interests in houses located on federal property in national forests and furnished to them as part of their compensation. The *Fresno* Court concluded "that a State may, in effect, raise revenues on the basis of property owned by the United States as long as that property is being used by a private citizen or corporation and so long as it is the possession or use by the private citizen that is being taxed." *Id.* 429 U.S. at 462, 97 S.Ct. at 704, 50 L.Ed.2d at 692. The *Fresno* Court then applied this rule to the facts presented in that case:

> "The 'legal incidence' of the tax involved in this case falls neither on the Federal Government nor on federal property. The tax is imposed solely on private citizens who work for the Federal Government. The tax threatens to interfere with federal laws relating to the functions of the Forest Service *only* insofar as it may impose an economic burden on the Forest Service — causing it to reimburse its employees for the taxes legally owed by them." *United States v. County of Fresno, supra* 429 U.S. at 464, 97 S.Ct at 705, 50 L.Ed.2d at 693 (emphasis in original).

Federal employees are not federal agencies or instrumentalities. In *United States v. County of Fresno, supra*, 429 U.S. at 464, 97 S.Ct. at 705, 50 L.Ed.2d at 693, this Court held that the legal incidence of a state tax fell on a federal employee carrying out governmental business. Nevertheless, the *Fresno* Court held that tax immunity was inappropriate.

This Court's decisions have recognized limitations on the immunity doctrine, including *United States v. New Mexico* (1982) 455 U.S. 720, 102 S.Ct. 1373, 71 L.Ed.2d 580, where the *New Mexico* Court upheld a tax on federal contractors even though the property purchased passed directly to the federal government and was actually paid for with drafts drawn on funds of the United States Treasury.

Regarding the use of government checks for payment, this Court stated:

> "[T]he Government earnestly argues that its contractors are entitled to tax immunity because, among other things, they draw checks directly on federal funds, instead of waiting a time for reimbursement. . . . We cannot believe that an immunity of constitutional stature rests on such technical considerations, for that approach allows 'any government functionary to draw the constitutional line by changing a few words in a contract.' " *United States v. New Mexico, supra*, 455 U.S. at 737, 71 L.Ed.2d at 594.

The *New Mexico* Court further held that the legal incidence of the tax fell on the contractors, and concluded that the contractors were not agencies or instrumentalities of the United States. *Id.* 455 U.S. at 740-741, 102 S.Ct. at 1385-86.

The Ninth Circuit holds, in effect, that employees of federal instrumentalities are federal instrumentalities themselves. Federal credit union employees are not federal agencies or instrumentalities. This is contrary to *United States v. County of Fresno, supra*, 429 U.S. at 464, 97 S.Ct. at 705, 50 L.Ed.2d at 693, which held

that the legal incidence of a state tax fell on a federal employee carrying out governmental business. Nevertheless, this Court held that tax immunity was inappropriate.

II.

THE NINTH CIRCUIT DECISION CONFLICTS WITH THE FOURTH CIRCUIT COURT OF APPEALS

The only decision on point by another circuit is directly at odds with the Ninth Circuit. Reversing a lower court, the Court of Appeals in *United States v. Montgomery County*, 761 F.2d 998, 999 (4th Cir. 1985) used the dictionary meaning of the word "transient" in holding that a county tax on transients renting hotel sleeping accommodations fell on the occupants of the sleeping accommodations [who were outpatients at the National Institutes of Health ("NIH")], and not on the NIH which reserved and paid for the rooms, even though the term was defined in the statute imposing a tax on all transients renting hotel sleeping accommodations.

The NIH had arranged with a private inn to supply accommodations, with NIH undertaking to meet room costs. *Id.* at 999. Noting that the local statute defined "transient" as a person who "obtained sleeping accommodations" for seven consecutive days or less, the *Montgomery County* court reasoned that while the NIH, in reserving and paying for rooms at the United Inn of America, may have been obtaining the rooms for use by others, it had not done so as a transient, and the legislative intent was clear that "obtain" was meant to apply to

the person who occupied the room. The *Montgomery County* court found that the tax was imposed on the temporary room occupant and not on the NIH which had booked the accommodations.

The objective of the transient occupancy tax is to tax transients.[3] Federal credit union employees coming and going to a convention amply fit the description of transients. A federal credit union, "or the United States Government which arranges a room for a month . . . which is occupied by any . . . *employee* . . . simply does not meet the definition of 'transient.' "[4] *United States v. Montgomery*, 761 F.2d 998, 1001 (4th Cir. 1985). "Transitory, passing, ephemeral, momentary, fleeting, evanescent;"[5] each fits the overnight employee guest. Use of those words for entities such as a federal credit union is simply inapposite.

Thus, federal credit unions, in making reservations and paying for rooms, have been reserving the rooms for use by employees, but they have not done so as a transient. In other words, to be a "transient" does not mean exclusively or even principally to book the room for employees. Included within the definition of the term "transient" is the term "occupancy" or the concept of achieving actual physical possession and use. Anaheim Municipal Code § 2.12.005.110. To obtain entry is a common phase which applies to "occupancy" as well as,

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[3] The tax is imposed on "each transient is subject to and shall pay a tax in the amount of . . ." Anaheim Municipal Code § 2.12.010.010.

[4] The point derives from the definition of a transient as: ". . . any person who exercises *occupancy* . . . ." The term "occupancy" simply does not extend to a federal credit union, the United States Government or other nonindividuals.

[5] See *Webster's Third New International Dictionary*, p. 2428.

or even more than, arrangement for the use by employees.[6]

Taxation is an eminently practical matter. If the hotel (serving as the statutory tax-collector) hands over the correct sum due the City of Anaheim, the City is not going to object to the hotel's accepting payment from the federal credit union employer. In *United States v. Montgomery County, supra*, 761 F.2d at 1002, n.13, the NIH gave vouchers to its guests. The vouchers or the cash they represented, in the hands of the visitors occupying the sleeping accommodations, were turned over to the inn. That manner of proceeding comports entirely with a construction of the law which made the transient guests of the NIH the taxpayers, rather than the NIH themselves. *Id.* This is exactly the situation at bar where the federal credit union has provided its employees checks to pay for their rooms.

"Since the tax falls on the transient, the occupant of the sleeping accommodations, the fact of reimbursement by the (federal credit union or) United States . . . does not invalidate it under the supremacy clause." *United States v. Montgomery County*, 761 F.2d 998, 1002 (4th Cir. 1985) citing *United States v. New Mexico*, 455 U.S. 720, 735, 102 S.Ct. 1373, 1383, 71 L.Ed.2d 580, 592 (1982)("immunity cannot be conferred simply because the tax is paid with Government funds . . . where the contractor made expenditures under an advanced funding arrangement similar to the one involved here."). The federal credit union's voluntary agreement to reimburse, or even fund in advance, an employee for transient occupancy taxes does not make the federal credit union's

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[6] The primary meanings of "occupancy" and "occupy" are "the taking and holding possession of" and "to take possession of." *Webster's Third New International Dictionary*, p. 1560-1561.

payments direct disbursements of federal credit union funds to the City of Anaheim.

In 55 Comp.Gen. 1278 (1976) the Comptroller General of the United States examined the propriety of a rental tax imposed on all transient guests renting hotel or motel rooms in Anchorage, Alaska. The Bureau of Indian Affairs of the United States Department of the Interior contracted with hotels and motels in Anchorage to pay housing costs for Indian students staying overnight in Anchorage while traveling between government schools and their homes. The term "Guest" was defined by the statute as "an individual corporation, partnership or association *paying monetary consideration for* the use of a sleeping room or rooms in the hotel-motel." [Emphasis added.] As the Bureau paid for the rooms, and the tax was imposed on "guests", — those who pay for their rooms — the legal incidence of the tax was held to have impermissibly fallen on the United States.

In the course of his opinion concerning the Anchorage Alaska tax, the Comptroller General discussed an earlier opinion, 53 Comp.Gen. 69 (1973), which considered the Montgomery County hotel room rental tax (the same tax as in the *United States v. Montgomery County* case cited above). The decision at 53 Comp.Gen. 69 (1973) held the **"transient" was the room occupant, and not the Government**, and thus the Government was not taxed directly. In this later opinion, however, the Comptroller General essentially reversed his previous opinion:

> "[T]he [Montgomery] County Code defines "transient" as a "person" who *obtains* sleeping accommodations and defines "person" as any "individual, corporation, company, association, firm," etc. Since the Government is the person who *obtained* and paid for

> these rooms under the County Code, the Government is the transient. Hence, our holding above as to the Anchorage motel tax would be equally applicable to the Montgomery County motel tax. Therefore, our holding in 53 Comp.Gen. 69 is modified to the extent it is inconsistent with the foregoing." [Emphasis added.]

55 Comp.Gen. 1278 at 1280-81 (1976). These two opinions are discussed in the district court opinion in *United States v. Montgomery County*, 586 F.Supp. 227, 229 (D. Maryland 1984).

The opinion at 55 Comp.Gen. 1278 (1976) is inapplicable to the case at bar. Here the transient occupancy tax falls on the transient who exercises occupancy of the sleeping accommodations in the hotel. Although the credit union obtained and paid for the room for its employee, nevertheless, the credit union is not a "transient" as defined in the Anaheim Municipal Code. " 'Transient' means any person who exercises occupancy . . ." Anaheim Municipal Code § 2.12.005.100. (App. E4). "Person" is not defined in the Anaheim Municipal Code.

The construction of statutes imposing tax liabilities may be supported by dictionary definitions, particularly where the word or words under judicial consideration are not specifically defined in the statute and have a common meaning. *United States v. Montgomery County*, 761 F.2d 998, 1001 n.9, n.10 (4th Cir. 1985). The primary meaning of "person" is "a human being." *Webster's Third New International Dictionary*, p. 1686; *Black's Law Dictionary*, Fifth Edition, p. 1028. Further, Anaheim Municipal Code § 2.12.005.050 defines "operator" as "any person, *corporation, entity, or partnership*

. . ." Thus, "person" means "a human being" in this context. Otherwise there would have been no reason to add "corporation" or "entity" to the definition of "operator." Corporations or entities cannot physically occupy hotel rooms; so, "person" can only mean the human occupant of the sleeping accommodations. This is what the City of Anaheim has argued all along. The fact that a transient can only be a human being and not a corporation means the legal incidence of the tax is not on the credit union. Thus, a credit union is not a "person" under the City's municipal code. The City of Anaheim has not imposed the tax directly on the credit union as the corporation or entity which booked the rooms, but on the employee, the human being who slept in them. The tax is due from the room occupants, and any arrangement made by the credit union to advance payment on their behalf is altogether collateral, and does not invalidate the power to assess the tax against the room occupant and to impose a tax collecting duty on the hotel. The City has imposed its tax solely on the occupants of the sleeping accommodations. *United States v. Montgomery County*, 761 F.2d 998, 1002-1003 (4th Cir. 1985).

Clearly there is a conflict between the Ninth Circuit and the Fourth about whether the TOT tax falls on the employee transient occupant of the sleeping accommodations or the federal credit union. That conflict requires resolution by this Court.

III.

THE NINTH CIRCUIT DECISION PRESENTS A JUSTICIABLE AND IMPORTANT QUESTION OF FEDERAL LAW

The questions raised here are important. Without a clarification by this Court, cities all over the country will face uncertainty in the application of their TOT taxes. The issue of whether the court has to make a distinction if the employee pays for the hotel room with a private check was raised below. Further, another issue raised was if an employee brings his or her spouse, does the spouse pay a TOT tax? The Ninth Circuit opinion does not directly answer these issues. Respondent has taken the position that the Ninth Circuit opinion allows payment for the hotel room to be made *without* an employer check, *i.e.*, with personal funds. This argument flies in the face of the cases that hold that where payment is made with personal funds there is no immunity from taxes. Clearly, a spouse who comes along for the business trip does not "stand in the Government's shoes."

The Comptroller General of the United States has long taken the position that "reimbursement" situations are not covered by the Federal Government's tax immunity. 55 Comp.Gen. 1278 (1976). In *Comptroller v. World Inns* (Md. 1987) 310 Md. 154, 156, 528 A.2d 477, 478, the court considered whether a government employee who pays for the rental of a hotel room with personal funds while on government business may be required to pay retail sales tax. The evidence adduced was that federal employees had executed an exemption certificate and paid for the rooms with cash, personal credit card, or personal check. *Id.* The Tax Court held that because the Comptroller had no way of verifying

whether a government employee who personally paid for a room was actually on government business, the rentals were subject to the sales tax. *Id.* 310 Md. at 157, 528 A.2d at 478. The question before the court was whether federal employees renting hotel rooms in their own names and paying for the rooms with personal funds enjoy immunity from state taxation. *Id.* 310 Md. at 158, 528 A.2d at 479. In the court's 1987 opinion, it reviewed several cases on collecting taxes from federal employees including *United States v. County of Fresno*, 429 U.S. 452, 97 S.Ct. 699, 50 L.Ed.2d 683 (1977).

In *Keystone Auto Leasing, Inc. v. Norberg* (R.I. 1985) 486 A.2d 613, relied upon by *Comptroller*, the question presented to the Rhode Island Supreme Court was whether employees of the federal government while on government business who paid for the rentals of automobiles in cash or with personal credit cards and were reimbursed by the government may be required to pay the State's sales tax. The Rhode Island court examined the United States Supreme Court decisions which have recognized limitations on the immunity doctrine, including *United States v. New Mexico* (1982) 455 U.S. 720, 102 S.Ct. 1373, 71 L.Ed. 2d 580. The Rhode Island Supreme Court concluded:

> "What has emerged from these (United States Supreme Court) decisions is a 'legal incidence' test that requires a determination of who is the 'purchaser' upon whom the ultimate burden of the tax will fall. As long as a state makes no claim of right to collection from the federal government or its instrumentalities, a state may impose a tax on those entities dealing for their own purposes with

> the federal government." *Id.* 486 A.2d at 615.

The *Keystone* court applied the legal incidence test and concluded that "when federal employees lease automobiles and pay for them with cash or personal credit cards, the legal incidence of the tax falls on the employees and not the federal government." Therefore, the court concluded that the employees were "not immune from state taxation and that the rentals in question constituted a taxable event." *Id* 486 A.2d at 616.

After reviewing the above, the *Comptroller* court held that the federal employees were the "purchasers," for they contracted directly with the Inn for the rental of rooms and paid for the rooms with their personal funds. The federal government was in no sense a party to the room rental arrangement. Consequently, the legal incidence of the tax fell on the employees and not the United States. The court therefore held "that because the legal incidence of the tax did not fall directly on the United States, or its agencies or instrumentalities, the rentals of hotel rooms by federal employees in this case were not immune from state sales tax." *Comptroller, supra*, 310 Md. at 162-163, 528 A.2d at 480-481.

The Ninth Circuit holds that employees of federal instrumentalities are federal instrumentalities themselves. *Comptroller, supra,* held that federal employees are not federal agencies or instrumentalities, citing this Court's decision in *Fresno*, 429 U.S. 452 at 464, 97 S.Ct. at 705, 50 L.Ed.2d at 693 (1977), as supporting this position. *Comptroller, supra*, 310 Md. at 163 n.4, 528 A.2d at 481 n.4.

Based on the above, the California Attorney General found that the election by a governmental agency to advance the room rental charges incurred by its employees while on official business did *not* transmute a local

transient occupancy tax into a direct tax on the government. 75 Ops.Cal.Atty.Gen. 86, 88 (1992); 65 Ops.Cal.Atty.Gen. 267, 269 (1982). While not controlling, the Attorney General's opinions are accorded substantial weight by state courts. *Mountain View Union High School Dist. v. City Council* (1959) 168 Cal.App.2d 89, 335 P.2d 957, 961 n.2.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

DATED: December 6, 1996.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CALIFORNIA CREDIT UNION LEAGUE, *Plaintiff-Appellee,* v. CITY OF ANAHEIM, *Defendant-Appellant.*	No. 95-55205 D.C. No. CV-94-05991-ER OPINION

Appeal from the United States District Court
for the Central District of California
Edward Rafeedie, District Judge, Presiding

Argued and Submitted
June 6, 1996—Pasadena, California

Filed September 9, 1996

Before: Robert R. Beezer and Melvin Brunetti,
Circuit Judges, and Jack E. Tanner,* District Judge.

Opinion by Judge Brunetti

COUNSEL

Moses W. Johnson, Deputy City Attorney, Anaheim, California, for the defendant-appellant.
Thomas H. Ott, Ott, Marquez & Horowitz, Glendale, California, attorneys for the plaintiff-appellee.

*Hon. Jack E. Tanner, Senior United States District Judge for the Western District of Washington, sitting by designation.

OPINION

BRUNETTI, Circuit Judge:

The City of Anaheim ("Anaheim") appeals the district court's grant of summary judgment in favor of the California Credit Union League ("League"). The League successfully sought a declaratory judgment that the city's application of its transient occupancy tax to credit union employees staying in local hotels violated 12 U.S.C. § 1768. Both parties agreed before the district court that the case should be resolved by summary judgment. The district court awarded summary judgment to the League. After reviewing *de novo*, *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995), we affirm.

I.

There is little dispute about the facts of this case. In November of 1993, federal credit union employees stayed at the Disneyland Hotel in Anaheim. The employees were attending a credit union seminar and thus were on credit union business. The employees were assessed a transient occupancy tax pursuant to Anaheim Municipal Code Chapter 2.12. The code defines a transient as anyone occupying a hotel room for thirty days or fewer. The tax is 13% of the rate charged by the hotel.

II.

[1] 12 U.S.C. § 1768 confers upon federal credit unions broad immunity from federal, state, and local taxation:

> The Federal credit unions organized hereunder, their property, their franchises, capital, reserves, sur-

> pluses, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property of such Federal credit unions shall be subject to. . .taxation to the same extent as other similar property is taxed. . . .

12 U.S.C. § 1768 (1994). Independent of the protection afforded by Section 1768, courts have generally considered federal credit unions to be instrumentalities of the federal government and thus immune from state taxation under the supremacy clause. *See, e.g., T I Fed. Credit Union v. DelBonis*, 72 F.3d 921, 934 (1st Cir. 1995); *United States v. State of Michigan*, 851 F.2d 803, 807 (6th Cir. 1988). Relying on our decision in *Jesinger v. Nevada Federal Credit Union*, 24 F.3d 1127, 1132 (9th Cir. 1994), the National Institute of Municipal Officers ("cities") argues, in an amicus brief, that federal credit unions are not instrumentalities of the United States.[1] Because courts have considered the immunity afforded by Section 1768 to be coterminous with that afforded by the supremacy clause, we do not address the cities' argument. *See Michigan*, 851 F.2d at 805 n.1, 807; *United States v. State of Maine*, 524 F. Supp. 1056, 1058-1060 (D. Me. 1981). If credit unions would be immune from local taxation were they to be considered an instrument of the federal government, then regardless of the instrumentality question they are immune from local taxation under Section 1768. *See Michigan*, 801 F.2d at 807.

Appellant, appellee, and many of the amici focus on whether the incidence of the Anaheim tax falls on the credit union or the employees. That indeed has been the test this court and the Supreme Court have applied when considering

[1]Before the district court, Anaheim conceded that federal credit unions are instrumentalities of the federal government. Anaheim has not changed its position before this court.

whether sales and other taxes on **independent** subcontractors of the United States are unconstitutional. *See, e.g., United States v. State Tax Comm'n of Miss.*, 421 U.S. 599, 608 (1975); *United States v. California State Bd. of Equalization*, 650 F.2d 1127, 1130-31 (9th Cir. 1981), *aff'd*, 456 U.S. 901 (1982). Even if the legal incidence of a tax falls on contractors or individuals, however, the question remains whether those parties are independent entities of the United States. *United States v. New Mexico*, 455 U.S. 720, 738 (1982). If they are not independent, the tax is invalid because it is a tax on the United States and thus the question of where the incidence of taxation lies is moot. *See id.*

In *New Mexico*, the Supreme Court, noting "the confusing nature of our precedents," concluded that the essence of the federal government's tax immunity is a prohibition against states assessing taxes "directly upon the United States." 455 U.S. at 733. Immunity from state or local taxation is only appropriate "when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned." *Id.* at 735. To avoid paying state or local taxes, "a private taxpayer must actually stand in the Government's shoes." *Id.* at 736 (internal citations omitted). *See also United States v. County of San Diego*, 965 F.2d 691, 697 (9th Cir. 1992) (quoting *New Mexico*).

The Supreme Court in *New Mexico* rejected the federal government's argument that contractors are not separate entities of the United States:

> The contractors here are privately owned corporations; [g]overnment officials do not run their day-to-day operations nor does the Government have any ownership interest. In contrast to federal employees, then, Sandia and its fellow contractors cannot be termed constituent parts of the Federal Government.

> It is true, of course that employees are a special type of agent, and like the contractors here employees are paid for their services. But the differences between an employee and one of these contractors are crucial. The congruence of professional interests between the contractors and the Federal Government is not complete; their relationships with the Government have been created for limited and carefully defined purposes.

Id. at 740-41 (internal citations omitted).

[2] The Court's analysis in *New Mexico* compels the conclusion that federal employees are constituent parts of the United States, at least with respect to their professional duties. *See id.* When acting on behalf of the federal government, the congruence between the professional interests of the employee and those of the government is complete. *See id.*

[3] Because the federal credit unions' employees were attending to credit union business while staying at the Disneyland Hotel in Anaheim, they were "constituent parts" of the credit union and immune from Anaheim's transient occupancy tax under Section 1768. *See id. Cf. United States v. County of Fresno*, 429 U.S. 452, 465-66 (1977). In *Fresno*, the Supreme Court held that employees of the Forest Service could be taxed for their possessory interest in houses on federal land. 429 U.S. at 465-66. The Court stressed that the housing was of personal benefit to the employees since everyone has to pay for housing. *Id.* Unlike the Forest Service employees in *Fresno*, the employees of the credit unions pay for housing elsewhere and had to bear the additional cost of staying in Anaheim solely because they were in the city on credit union business. *See* 429 U.S. at 465-66. Therefore, Anaheim's application of its transient occupancy tax to those employees violated Section 1768.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
NOV 22, 1994
Clerk, U.S. District Court
Central District of California
By Deputy

CALIFORNIA CREDIT UNION LEAGUE, et al.
Plaintiffs,
v.
CITY OF ANAHEIM, et al.
Defendants.

CV 94-5991 ER (GHKY)

ORDER DENYING DEFENDANTS' MOTION TO DISMISS AND GRANTING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS

The parties came before this Court on November 14, 1994. The Court, having read and considered the moving and opposing papers and arguments of counsel, and for the reasons stated in open court, HEREBY ORDERS:

(1) that defendants' Motion to Dismiss for Failure to State a Claim is DENIED; and
(2) that summary judgment is GRANTED in favor of the plaintiffs,

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve, by United States mail, copies of this Order on counsel for the parties in this matter.

Dated: November 22, 1994

/s/ EDWARD RAFEEDIE
EDWARD RAFEEDIE
United States District Judge

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
Jan 9, 1995
Clerk, U.S. District Court
Central District of California
By Deputy

CALIFORNIA CREDIT UNION LEAGUE,
Plaintiff,
v.
CITY OF ANAHEIM, et al.,
Defendants.

CV 94-5991 ER

JUDGMENT

On November 14, 1994, this Court granted Plaintiff's Motion for Summary Judgment in this action. Accordingly, judgment in this case is hereby entered in favor of the Plaintiff in this case, and Plaintiff shall have its costs.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve, by United States mail, copies of this Order on counsel for the parties in this matter.

Dated: January 9, 1995

/s/ EDWARD RAFEEDIE
EDWARD RAFEEDIE
United States District Court Judge

APPENDIX D

12 USCS § 1768

§1768. Taxation

The Federal credit unions organized hereunder, their property, their franchises, capital, reserves, surpluses, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property of such Federal credit unions shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed. Nothing herein contained shall prevent holdings in any Federal credit union organized hereunder from being included in the valuation of the personal property of the owners or holdings thereof in assessing taxes imposed by authority of the State or political subdivision thereof in which the Federal credit union is located; but the duty or burden of collecting or enforcing the payment of such a tax shall not be imposed upon any such Federal credit union and the tax shall not exceed the rate of taxes imposed upon holdings in domestic credit unions.

(June 26, 1934, ch 750, Title I, § 122 [23] [18], 48 Stat. 1222; Dec. 6, 1937, ch 3, § 4, 51 Stat. 4; Sept. 22, 1959, P. L. 86-354, § 1, 73 Stat. 637; Oct. 19, 1970, P. L. 91-468, § 1(2), 84 Stat. 994.)

APPENDIX E

CITY OF ANAHEIM

TRANSIENT OCCUPANCY TAX
Chapter 2.12

Sections:

2.12.000	**Short title.**
2.12.005	**Definitions.**
2.12.010	**Transient occupancy tax imposed.**
2.12.015	**Exemptions.**
2.12.020	**Operator's collection duties.**
2.12.025	**Rules and regulations and interpretations.**
2.12.030	**Reporting and remitting.**
2.12.040	**Taxes to be held in trust.**
2.12.050	**Delinquent tax payments — Interest and penalties.**
2.12.060	**Failure to collect and report tax — Determination of tax by city auditor — Appeal.**
2.12.075	**Payment under protest required.**
2.12.080	**Statement of tax not conclusive on city.**
2.12.090	**Transient occupancy tax a debt — Civil action.**
2.12.095	**Duty and liability of operator's successor.**
2.12.100	**Remedies cumulative.**
2.12.110	**Reimbursement to qualifying organizations.**

2.12.000 SHORT TITLE.

This chapter shall be known and cited as the Transient Occupancy Tax Code. (Ord. 5305 § 1 (part); May 27, 1992.)

2.12.005 DEFINITIONS.

For purposes of this chapter, the following words, terms, phrases, and the derivations and variants thereof, shall have the meanings given herein:

.010 "Anaheim" or "City" means the City of Anaheim.

.020 "City Auditor" means the Audit Manager of the City.

.025 "Fiscal Year" means the period commencing July 1 of one calendar year through June 30 of the immediately subsequent calendar year.

.030 "Homeless person" means any person who lived or resided in Anaheim immediately prior to being provided shelter in a hotel by a Qualifying Nonprofit Service Organization.

.040 "Hotel" means any structure or portion thereof, which is occupied or intended or designed for occupancy by transients for dwelling, lodging, or sleeping purposes, including, without limitation, any hotel, bachelor hotel, lodging house, rooming house, bed and breakfast inn, apartment house, dormitory, vacation ownership resort, public or private club, mobilehome or house trailer at a fixed location, or other similar structure or portion thereof, and shall further include any space, lot, area or site in any trailer court, camp, park, or lot which is occupied or intended or designed for occupancy by a tent, trailer, recreational vehicle, mobilehome, motorhome, or other similar conveyance, for dwelling, lodging or sleeping purposes.

.050 "Operator" means any person, corporation, entity, or partnership which is the proprietor of the hotel, whether in the capacity of owner, lessee, sublessee, mortgagee in possession, debtor in possession, licensee or any other capacity. Where the operator performs its functions through a managing agent of any type or character other than as an employee, the managing agent

shall also be deemed an operator and shall have the same duties and liabilities as its principal. Compliance with the provisions of this chapter by either the principal or managing agent shall constitute compliance by both. For purposes of the notice and appeal provisions of this chapter only, "operator" shall also include any managing employee or employee in charge of the hotel.

.060 "Qualifying Nonprofit Service Organization" means any nonprofit service organization which (a) is member of the Anaheim Human Services Network and (b) directly pays the cost of sheltering homeless persons in a hotel and (c) does not directly or indirectly further any religious purpose by providing such shelter.

.070 "Qualifying Rental Agreement" means and is limited to a written contract signed by both the landlord and tenant, legally enforceable by either party, for a rental period of not less than thirty-one consecutive days. "Qualifying Rental Agreement" shall expressly include: (1) any agreement regardless of length of the rental term which is terminated for any reason by either party or by mutual consent prior to the thirty-first consecutive day of the tenancy, or (2) any agreement regardless of the length of the rental term which is for occupancy of space in an establishment which is authorized as a "hotel" or "motel" pursuant to the terms of Title 18 (Zoning) of this Code, or (3) any agreement regardless of the length of the rental term for occupancy of space by any recreational vehicle as defined in Section 799.24 of the Civil Code of the State of California or any successor provision thereto, or (4) any agreement which would be unlawful or constitute a violation of law.

.080 "Rent" means the consideration charged by an operator for accommodations, including without limitation any (1) unrefunded advance rental deposits or (2) separate charges levied for items or services which are part of such accommodations including, but not limited

to, furniture, fixtures, appliances, linens, towels, non-coin-operated safes, and maid service. "Rent" shall not include any charge, billing, or account or portion thereof which the operator finds to be worthless or uncollectible and charged off for tax purposes. If any such worthless or uncollectible rent is thereafter collected, the amount shall be considered rent in the month collected and the tax collected shall be included in the next monthly payment to Anaheim by the operator.

.090 "Tax" (where such term is not capitalized) means the amounts imposed pursuant to Section 2.12.010 of this chapter, "Tax" (where such term is capitalized) means 1) the tax and 2) any applicable interest and penalties imposed by this chapter and 3) any amount collected by an operator under a representation that it is a tax which is not refunded in accordance with this chapter.

.100 "Transient" means any person who exercises occupancy, or is entitled to occupancy, of any room, space, lot area or site in any hotel by reason of concession, permit, right of access, license or other agreement whether written or oral. Any such person shall be deemed to be a transient until the thirty-first consecutive day of such occupancy and the tax shall be due upon all rent collected or accruing prior to said thirty-first consecutive day unless the occupancy is pursuant to a Qualifying Rental Agreement. (Ord. 5305 § 1 (part); May 27, 1992.)

2.12.010 TRANSIENT OCCUPANCY TAX IMPOSED.

.010 For the privilege of occupancy in any hotel, each transient is subject to and shall pay a tax in the amount of thirteen percent of the rent.

.020 Notwithstanding subsection .010 above, where an operator has entered into a binding written contract

with any party (the "rate contract") which rate contract (i) was entered into by all parties thereto and in full force and effect prior to April 7, 1992, (ii) agreed to provide occupancy in a hotel to transients, on whose behalf of such parties have contracted, at an agreed upon rate or price specified in said contract (the "contract price") which contract price expressly includes applicable tax imposed pursuant to this chapter, and (iii) said tax which was expressly included in said contract did not exceed the applicable tax in effect pursuant to this chapter on April 7, 1992, the following provision shall apply with regard to the amount of tax imposed pursuant to this chapter upon any transient for the privilege of occupancy in any hotel under the terms of such rate contract for the period commencing on July 1, 1992, and ending on the last date of occupancy pursuant to the terms of said rate contract, or December 31, 1992, whichever occurs earlier:

> For the privilege of occupancy of space in a hotel, each transient is subject to and shall pay a tax in the amount of eleven and six-tenths percent (11.6%) of the rent.

The License Collector shall issue forms and regulations to implement the provisions of this subsection.

.030 Notwithstanding subsection .010 above, where any travel company, travel broker, travel agent or any other person or entity (the "agent") has entered into a binding written contract with any operator (the "agency contract"), which agency contract was entered into by all parties thereto and in full force and effect prior to April 7, 1992, and which agency contract provides that occupancy in such operator's hotel (the "hotel")' shall be provided to transients on whose behalf the agent and the operator have contracted at a fixed rate (the "fixed rate") (regardless of whether said fixed rate includes or excludes taxes imposed pursuant to this chapter and

regardless of whether said agency contract provides that such taxes are subject to increase, adjustment or change) and where, based upon such agency contract and prior to April 7, 1992, the agent either (1) entered into a binding written contract with any transient, any agent of any transient, or any other person or entity, agreeing to provide or arrange to provide occupancy in such hotel to any transient at a fixed price which included any taxes imposed pursuant to this chapter and which fixed price is collected by the agent and forwarded in whole or part to the operator as rent, or (2) advertised to the general public that such agent would provide or arrange to provide occupancy in such hotel at a fixed price which included any taxes imposed pursuant to this chapter and which fixed price is collected by the agent and forwarded in whole or part to the operator as rent, then the following provision shall apply with regard to the amount of tax imposed pursuant to this chapter upon any such rent received by the operator from such agent for the privilege of occupancy in such hotel by any transient (on whose behalf the agent and the operator have contracted) for the occupancy period commencing July 1, 1992 and ending on the last date of occupancy pursuant to the terms of said agency contract, or at midnight on December 31, 1992, whichever occurs earlier:

> For the privilege of occupancy of space in a hotel, each transient is subject to and shall pay a tax in the amount of eleven and six-tenths percent (11.6%) of the rent.

2.12.015 EXEMPTIONS.

No tax shall be imposed upon any person as to whom, or any occupancy as to which, it is beyond the power of Anaheim to impose the tax. (Ord. 5305 § 1 (part); May 27, 1992.)

2.12.020 OPERATOR'S COLLECTION DUTIES.

.010 Each operator shall collect the tax to the same extent and at the same time a the rent is collected from every transient. The amount of the rent and the tax thereon shall be separately stated from all other amounts on all receipts and books of record of the hotel, and each transient shall be tendered a receipt for payment from the operator with rent and tax separately stated thereon. No operator shall advertise or state in any manner, directly or indirectly, that the tax or any part thereof will be assumed or absorbed by the operator or that the tax will not be added to the rent or that, if added, any part of the tax will be refunded except in the manner hereinafter provided. Notwithstanding the foregoing provision of this subsection, nothing contained herein shall require the operator to separately state the rent and the tax thereon on receipts and books of record or prohibit the operator from advertising or stating that the tax will be assumed or absorbed by the operator or that such tax will not be added to the rent, provided such room accommodations constitute a portion of a collective group of services, privileges, entitlement or benefits (hereinafter "benefits") which benefits include, at a minimum, room accommodations and food and beverage services or room accommodations and at least one other benefit having an ascertainable fair market value (hereinafter "special package") offered for one fixed charge (hereinafter "special package rate").

.011 In the event the operator fails to separately state the rent and tax from other amounts on all receipts and books of record, the operator shall file with the License Collector a statement of each special package rate on a form (hereinafter "Special Package Form") provided by the License Collector. The Special Package Form shall include the special package rate, and an

itemization of the values of the items included, including, at a minimum, the rent, tax, and any other item. The operator must submit documentation to substantiate the claimed fair market value of individual items included other than rent and tax. The License Collector shall mark the date of receipt on the Special Package Form and review the submitted information to determine if sufficient information is provided to verify that the numbers are mathematically correct and complies with this chapter. If the package meets the foregoing requirements, the License Collector shall assign a unique number to the Special Package Form and return a copy to the operator within fourteen City business days of receipt. The operator may use the assigned unique number or may assign the operator's unique name/number to each package and notify the License Collector to imprint the name/number on the Special Package Form. This unique name/number must appear on all receipts and books of record whenever the package is sold. If the package fails to meet the requirements of this Subsection, the License Collector will advise the operator of any required changes within fourteen City business days. The operator must either make the required changes and resubmit the Special Package Form or comply with subsection 2.12.020.010. A new Special Package form must be submitted in the event of any change in the special package rate or the specified rate (subsection 2.12.020.013), or other items in the special package which exceeds ten percent and for any new special package(s) offered/used. Any change of items within the special package constitutes a new special package. The effective date of the special package rate shall be the date of receipt by the License Collector if the package is removed.

.012 No Special Package Form shall be accepted for filing unless accompanied by a filing fee in the amount established by resolution of the City Council.

.013 As to any package sold by the operator for which the License Collector has approved the package and assigned the unique number, the tax shall apply only to the amount of rent identified in the Special Package Form (hereinafter "specified rate") until such time as the License Collector shall inform the operator that the approval is revoked.

.014 In the event an operator fails to comply with subsection 2.12.020.010 and also fails to file a Special Package Form and obtain approval of a specified rate pursuant to subsection 2.12.020.011, the portion of the special package rate attributable to the room accommodations for purposes of determining the tax (hereinafter "imputed rate") shall be deemed the lesser of (a) the amount collected for the total special package or (b) an amount equal to the median average double occupancy room rate for such accommodations as posted in such room pursuant to the requirements of Section 1863 of the Civil Code (or any successor section). The burden to prove such posted room rates shall be upon the operator. In the event the operator fails to present satisfactory proof of such rates, such posted rates shall be deemed the posted rates in effect at the time of the audit.

.015 Notwithstanding subsections 2.12.020.011, 2.12.020.013, or 2.12.020.014, if any audit reveals that the gross income to the operator attributable to the accommodations portion of such special package (hereinafter "audited rate") is more than ten percent greater than the specified rate, the rent for tax purposes shall be the audited rate. In the event subsection 2.12.020.014 applies and the audited rate is greater than the imputed rate, the rent for tax purposes shall be the audited rate. The audited rate shall be determined by an audit of a sample of the special packages sold by the operator within an individual special package category. The audited rate shall be the amount of the special

package rate remaining after deducting the fair market value of each of the benefits included in the special package rate other than room accommodations and room tax. Where more than one type of special package was offered within the audit period, each special package shall be audited separately for purposes of determining the applicable audited rate. Credits or offsets shall not be allowed between different special packages.

.020 Any amount charged and collected by the operator from any transient beyond the period for which the tax is imposed, which amount is in excess of the rent theretofore charged the transient for the same accommodations and upon which rent tax was imposed and collected, shall be conclusively deemed collected under the representation by the operator that such excess amount was tax. If the operator gives such person written notice prior to the accrual of the obligation therefor that such excess amount constitutes an increase in the rental rate this subsection shall not apply. The burden to prove such notice shall be upon the operator.

.030 Whenever an operator who has collected any sum under the representation that it was tax (which sum was not required to be collected as tax) remits said sum to Anaheim and thereafter refunds such sum in whole or part, such operator may take the amount of such refund as a credit against future transient taxes only upon submitting to the License Collector a statement under penalty of perjury specifying the reasons for the credit and proof of payment of such refund.

.040 Nothing contained in this chapter shall require the refund by Anaheim to any person of such sum collected by the operator and remitted to Anaheim even where such sum was not otherwise required to be collected and remitted.

.050 Nothing contained in this chapter shall be deemed to authorize as a credit against tax any amount paid by the operator to any tour promoter, travel agent,

or third party other than the transient. Travel agent commissions are an expense of the operator and may not be deducted from the rent. (Ord. 5305 § 1 (part); May 27, 1992.)

2.12.025 RULES AND REGULATIONS AND INTERPRETATIONS.

The License Collector may promulgate rules and regulations consistent with the provisions of this chapter as may be necessary or desirable to aid in the enforcement and administration of this chapter. Any such rule or regulation which may affect the amount of the Tax or tax owed Anaheim shall be subject to approval of the City Council. Said rules and regulations shall be filed in the Office of the License Collector and maintained in an orderly and readily accessible manner. The burden to secure and comply with the rules and regulations shall be upon the operator. (Ord. 5305 § 1 (part); May 27, 1992.)

2.12.030 REPORTING AND REMITTING.

.010 Each operator shall, on or before the close of City business on the last City business day of each month (hereinafter "due date"), file a return with the License Collector on forms provided by the License Collector stating the total rents charged and the amount of tax collected during the immediately preceding calendar month. The full amount of the tax (minus any authorized credits) shall be remitted to the License Collector.

.020 Taxes are paid only upon receipt of both the tax return and the tax by License Collector. Failure of the operator to submit and the License Collector to receive both the completed return and payment on or before the due date constitutes non-payment. (Ord. 5305 § 1 (part); May 27, 1992.)

2.12.040 TAXES TO BE HELD IN TRUST.

.010 All taxes collected by the operator shall be held in trust by such operator for the account of Anaheim until payment thereof is made to the License Collector.

.020 Upon non-payment by an operator, or when the City Auditor makes a determination pursuant to Section 2.12.060, the License Collector shall issue a Jeopardy Determination to require the operator to furnish additional information or provide adequate security as necessary to ensure collection of any Taxes due or to become due, and to remit taxes on a daily or weekly basis. The operator shall thereafter report and remit all taxes due under the terms and conditions prescribed by the License Collector. The License Collector shall cancel the Jeopardy Determination once timely accounting and remittance procedures have been established and the operator is satisfying all obligations imposed by law pertaining to the Tax. (Ord. 5305 § 1 (part); May 27, 1992.)

2.12.050 DELINQUENT TAX PAYMENTS — INTEREST AND PENALTIES.

.010 Notwithstanding any other provisions hereof, upon non-payment, interest equal to one and one-half percent thereof per month calculated from the first day immediately following the due date to the date of payment shall be added to the tax. Interest may not be waived.

.020 Notwithstanding any other provisions hereof, upon non-payment, a penalty of ten percent for each month, or portion thereof, said payment is overdue, shall be added by the License Collector on the first day immediately following the due date; provided, however, that the amount of such penalty shall not exceed fifty percent of the tax. Penalties may not be waived.

.030 In the event of payment of the tax and non-payment of the interest and/or penalties, interest at the rate set forth in subsection 2.12.050.010 shall accrue upon the amount of the unpaid interest and penalties until the date of payment.

.040 In the event the Tax becomes final under Section 2.12.060, interest and penalties at the rate set forth in Section 2.12.050 shall accrue upon the amount of unpaid Tax until the date of payment of the full amount of Tax. (Ord. 5305 § 1 (part); May 27, 1992.)

2.12.060 FAILURE TO COLLECT AND REPORT TAX — DETERMINATION OF TAX BY CITY AUDITOR — APPEAL.

.010 If any operator shall fail or refuse to collect said tax and to make, within the time permitted, any report and remittance of tax, or any portion thereof, the City Auditor shall proceed in such manner as the City Auditor may deem best to obtain facts and information on which to base an estimate of the tax. The City Auditor shall proceed to determine and assess the Tax against such operator. The City Auditor shall give notice of the amount so assessed by serving it personally or by depositing it in the United States mail, postage prepaid, addressed to the operator at the operator's last known address.

.020 An operator who contests the amount assessed may, within ten days after the serving or mailing of such notice, make an Application for Hearing to the License Collector. The Application for Hearing shall specify the basis of the appeal and amount of Tax contested. The License Collector may request additional information pertaining to the appeal which information must be submitted prior to scheduling a hearing on the appeal. If Application for Hearing is not made within the time

prescribed, the Tax assessed shall be final and conclusive and immediately due and payable.

.030 If Application for Hearing is timely made, a Hearing Officer shall be appointed by the License Collector to conduct a hearing on and limited to the issues set forth in the Application for Hearing. The Hearing Officer shall give not less than fifteen days' written notice to the operator to show cause at a time and placed fixed in said notice why the amount assessed should not be fixed for such Tax. At the hearing, the operator may appear and offer evidence why the Tax assessed should not be so fixed. A rebuttable presumption shall exist at said hearing that the amount of Tax assessed is correct and the burden of proof shall be upon the operator.

.040 After the hearing, the hearing, the Hearing Officer shall determine the proper amount of the Tax and shall thereafter give notice to the operator and the License Collector of such determination. The amount determined to be due shall be due and payable fifteen days from the date of service of said written notice.

.050 The Hearing Officer may be an employee of Anaheim; provided, however, that upon the agreement of the operator to pay the costs associated with the hearing and the deposit of sufficient funds to cover said costs, the License Collector shall appoint a Hearing Officer, acceptable to both the operator and the City Attorney, who is not an employee of Anaheim.

.060 Notwithstanding the provisions of Section 1.12.110 of this Code, the decision of the Hearing Officer shall be final and conclusive and shall be the final administrative procedure available to the operator or to Anaheim. (Ord. 5305 § 1 (part); May 27, 1992.)

2.12.075 PAYMENT UNDER PROTEST REQUIRED.

Notwithstanding any provision to the contrary, any operator tendering payment of the Tax, or any portion thereof, shall for all purposes thereafter be precluded and barred from appealing, contesting or otherwise challenging the validity of such Tax pursuant to any procedure available in this chapter or any other legal remedy, unless the payment is made under written protest. Written protest shall be made only by the following methods:

.010 A written notation set forth on the check, money order or negotiable instrument by which payment is tendered, that the payment is made under protest; or,

.020 A written notice that the payment is made under protest delivered to the License Collector at the time of payment of the Tax. (Ord. 5305 § 1 (part); May 27, 1992.)

APPENDIX F

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HONORABLE EDWARD RAFEEDIE, JUDGE PRESIDING

CALIFORNIA CREDIT UNION
LEAGUE, ET AL.,
Plaintiffs,

vs.

CITY OF ANAHEIM, ET AL.,
Defendants.

CASE NO. CV-94-5991-ER

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

MONDAY, NOVEMBER 14, 1994

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LOS ANGELES, CALIFORNIA;
MONDAY, NOVEMBER 14, 1994
(10:00 A.M.)

THE CLERK: Civil 94-5991, California Credit Union League, And Others v. The City of Anaheim, And Others.

Counsel, Please state your names for the record, please.

MR. OTT: Thomas OTT, O-T-T, your Honor, on behalf of the plaintiff California Credit Union League.

MR. JOHNSON: Good Morning, your Honor. Moses Johnson, J-O-H-N-S-O-N, Deputy City Attorney, on behalf of defendant City of Anaheim.

THE COURT: Well, we are dealing here with whether or not the City of Anaheim has the lawful authority to impose an occupancy tax upon an employee of a federal credit union who is occupying a hotel room in the city on business for the credit union.

The plaintiff's representing the union, California Credit Union League, has alleged that Anaheim is imposing an unlawful transient occupancy tax upon federal credit union employees.

The plaintiff argues that the employees are exempt from this taxation pursuant to Title 12, USC 1768; and the defendant's argue that 12 USC 1768 only exempts the credit union and not the credit union's employees from the tax.

The court has read and considered the papers that have been filed in the case. It is the court's tentative view that the defendant's motion to dismiss for failure to state a claim with prejudice should be denied, and that the plaintiff's motion for summary judgment should be granted.

I think that both of these parties have agreed this is appropriate for summary judgment; is that correct?

MR. JOHNSON: That is correct, your Honor.

MR. OTT: Yes.

THE COURT: It was not initially filed as a summary judgment.

In the opposition the respondent asked for that. In the reply you conceded that that would be appropriate; is that right?

MR. JOHNSON: That is correct, your Honor.

THE COURT: Well, the court basically believes the motion of the defendant should be denied for the following reasons: The law is that to resist the state or any governmental entity's taxing power, the private taxpayer must actually stand in the government's shoes. This comes from the Supreme Court in the case of United States v. New Mexico.

The Federal Credit Union Employees occupy a space in the hotel under the facts of this case because the government as an entity cannot physically occupy. The only way the credit union can occupy the hotel room is because one of it's employees does. There is no way for the credit union to occupy a hotel room. Their interest in renting the room is not separate from their employment interest. They would probably be sleeping in their own beds, but for the fact that they were sent to this hotel on business for their employer.

Therefore, they do stand in the shoes of the government, and the incident of the tax should fall on the government as their employer, not them as employees.

For the City to contend that only the Entity itself is exempt from taxation is somewhat farfetched. The entity does not occupy hotel rooms, only it's employees do.

Now, the plaintiff's motion for summary judgment, in the view of the court, should be granted for the following reasons: First, matters of statutory interpretation are properly determinable at the summary judgment stage. The only fact that is in dispute is whether the City of Anaheim levies the tax against the employees or the Federal Credit Union. This is not a material fact, but an interpretation of the statutory law.

In the view of the court, the judgment is appropriate at this point and should be granted in favor of the plaintiff because the tax is levied against the federal credit union and not the personal employees when they are occupying the hotel on the employer's business.

Do you wish to be heard for the City?

MR. JOHNSON: Yes, your Honor.

I think one of the things that needs to be addressed if the court is going to grant the motion for summary judgment, is what proof is the hotel going to need to know that this employee is on Federal Credit Union business? Some of the exhibits attached to the complaint were a little contradictory.

THE COURT: That isn't what you have said in your papers. In your papers you said that the entity itself is exempt, not the employee. Now you are trying to change your position here a little bit.

MR. JOHNSON: What I'm concerned about, your Honor, is implementation of the court's ruling. How is the hotel going to know when they are looking at a person whether they are there on credit union's business or they are there on personal business?

THE COURT: They have the right to demand proof.

MR. JOHNSON: Okay.

THE COURT: I do this all the time when I travel. I file certificates of exemption that I am on government business at a hotel, which I do frequently go to other districts to sit. I sign a certificate of exemption. That's usually sufficient. But I would also have a designation designating me to sit in that district if they wanted additional proof.

So you are not challenging the right of the employees to obtain an exemption, but you are saying that they must offer more proof. And I think that that's within your province to say, "We will grant the exemption only upon proof of some kind that the employee is here on business for the employer."

You have the right to do that, and you have the right to satisfy yourself that that is the case.

MR. JOHNSON: That is one of the City's concerns, your Honor. But going to the merits, I would only say that all of the cases that I have cited to the court that dealt with transient occupancy tax, even though it dealt in situations where the employee was on some form of government business, all of those cases held that the tax was on the occupant of the room, the employer, irregardless of whether the employer advanced the payment.

THE COURT: Irregardless is not a word. I want to tell you the rest of that. Irregardless is not a word, regardless of what you may have heard.

(Laughter)

MR. JOHSON: I will take your word at it, your Honor.

The point I was trying to make, your Honor, is all of the cases that dealt specifically with the transient occupancy tax, not a sales tax, not a use tax, have all held that the tax fell upon the occupant, even when the employee was acting on behalf of the employer, acting on governmental business.

It is the question of whether the legal incident falls, and in those cases they all found it fell on the employee.

THE COURT: If the Employer paid the tax, as they did in this case, if the employer paid the occupancy tax, then it simply is tax on the employer, the federal agency. And it is always a body that's in the room that gets taxed when the bill is billed to the occupant, but the occupant submits a bill to — the federal Government is very laxed about this. They pay more taxes than they should.

I go many places where we pay the tax. Pay the occupancy tax and then the government reimburses. They don't have the mechanism to establish it. They leave it pretty much to the employee to find a way to do it. And many of these hotels and cities don't like it, and they don't make it easy for you. They throw up obstacles, and you just say, "Heck with it."

MR. OTT: Your Honor, could I just for clarification.

THE COURT: Yes.

MR. OTT: Not trying to go out of order here.

But the California Credit Union League has asked for a declaratory judgment which affects situations where the Federal Credit Union pays directly by invoice submitted to the Federal Credit Union for the traveling employee on Federal Credit Union business pays with corporate credit card. That we say constitutes direct payment by the Federal Credit Union entity.

We haven't even asked for a declaratory judgment in a reimbursement situation. Because giving the City the benefit of the doubt, we think that might be difficult to track.

THE COURT: The card is not enough unless the hotel is willing to accept it.

I have a government credit card, but I'm responsible for making the payments on it, not the government. It says U.S. Court. The agreement with the cardholder is that I am responsible for every charge incurred on that card. And it is certainly evidence where you use a government credit card that you are probably there on government business.

If you go to the Hilton Hotel on a government rate, they will always present you with a certificate of exemption, which you sign, and which authorizes them then not to charge the tax. I do that at Hilton Hotels when I go there. Not all hotels provide that service. Many of them will try to discourage it.

MR. JOHNSON: Well, your Honor, I think this brings up another problem of implementing the court's ruling. Many of the exhibits attached to the complaint were credit cards. How is the hotel supposed to know just based upon the credit card that the employee really is on government business? What if not only the employee is going to stay in the room, let us say they bring their spouse or their children? Is the hotel to somehow split the rate? Half of it will apply to the spouse and children and the other half won't be applied to employees —

THE COURT: Most of these places they don't charge any more for one than for two; that's my experience.

Now the State of California provides a certificate. I don't know why the City of Anaheim cannot fashion a certificate to it's satisfaction to have the employee sign it claiming that he is there on government business, and you have the ability to confirm it probably, if you want to.

MR. OTT: In all of the exhibits we attached, the Federal Credit Union did provide a certificate of tax exemption to the hotels, your Honor.

THE COURT: Yes.

Well, the court will stand by it's tentative ruling to deny the defendant's motion to dismiss for failure to state a claim with prejudice, and to grant the plaintiff's motion for summary judgment in favor of the plaintiff.

MR. OTT: Thank you, your Honor.

Should I submit a more specific order, your Honor?

THE COURT: I think we will prepare our own order.

MR. OTT: Thank you very much.

MR. JOHNSON: Thank you, your honor.

(Proceedings adjourned.)

* * * * * * *

I, Mary Tucker, CSR, do hereby certify that the foregoing transcript is true and correct.

/s/ MARY TUCKER	1-595
MARY TUCKER, CSR	DATE

Supreme Court, U.S.
FILED
JAN 13 1997
CLERK

No. 96-936

In The

Supreme Court of the United States

October Term, 1996

CITY OF ANAHEIM,

Petitioner,

vs.

CALIFORNIA CREDIT UNION LEAGUE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner City of Anaheim's levying its transient occupancy tax on federal credit union employees staying in local hotels while on the business of the federal credit union employer violates the provision of tax immunity to federal credit unions under 12 U.S.C. § 1768.

PARTIES TO THE PROCEEDINGS

Petitioner is the City of Anaheim ("Anaheim"). The respondent is the California Credit Union League (the "League").[1]

1. Amici curiae briefs were filed in the court of appeals below. The United States Government filed a brief in support of respondent California Credit Union League's position. The Hawaii Credit Union League joined the League's brief. The National Association of Federal Credit Unions and the Credit Union National Association, Inc., also filed amici briefs in support of the League. The National Institute of Municipal Law Officers filed an amicus brief in support of petitioner City of Anaheim.

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Respondent requests that the Court deny the petition for writ of certiorari seeking review of an opinion of the Court of Appeals of the Ninth Circuit Court of Appeals (the "Petition"). The Ninth Circuit decision is reported at 95 F.3d 30 (for the convenience of the Court, all citations to the opinion will be to the opinion attached as Appendix A to the Petition). United States District Court for the Central District of California's order denying petitioner City of Anaheim's Motion to Dismiss and granting respondent California Credit Union League's Motion for Summary Judgment is attached to the Petition as Appendix B. The Judgement is attached to the Petition as Appendix C.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on September 9, 1996. Anaheim did not petition the Ninth Circuit for rehearing. Anaheim timely filed its Petition on December 6, 1996, within 90 days of entry of the court of appeals judgment. Anaheim invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

Anaheim appears to seek certiorari in part to have this Court answer practical questions about the legal consequences arising out of the Ninth Circuit decision which were not adjudicated by neither the district court nor the court of appeals. (Petition at 16.) This Court lacks jurisdiction to rule on matters not adjudicated by the courts below. 28 U.S.C. § 1251.

STATUTES INVOLVED

The controlling statute is 12 U.S.C. § 1768, a section of the Federal Credit Union Act. The applicable provision is as follows:

> The Federal credit unions organized hereunder, their property, their franchises, capital, reserves, surpluses, and other funds,

> and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority, except that any real property and any tangible personal property of such Federal credit unions shall be subject to . . . taxation to the same extent as other similar property is taxed. . . .

The statute is set forth in full at Petition Appendix D.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the Case Below

This case involves the straight-forward application of the broad tax immunity Congress conferred on federal credit unions through 28 U.S.C. § 1768. The facts are simple and undisputed. In November 1993, employees of twenty four federal credit unions attended a conference for credit unions held at the Disneyland Hotel in Anaheim, California. It is undisputed that the credit union employees were on credit union business. The rooms at the hotel had been reserved and paid for by the federal credit unions. The employees presented certification of federal credit union tax exempt status. Nevertheless, these federal credit union employees were assessed a 13% transient occupancy tax pursuant to Anaheim Municipal Code Chapter 2.12. The federal credit unions paid the tax under protest.

On September 1, 1994, Respondent California Credit Union League, in its capacity as a trade association representing the interests of constituent federal credit unions, filed a declaratory relief action against the City of Anaheim in the United States District Court for the Central District of California, *California Credit Union League v. City of Anaheim*, Case No. CV 94-5991

ER (GHx). The lawsuit alleged that by levying its transient occupancy tax on federal credit union employees on federal credit union business, the defendant, City of Anaheim, had violated the tax immunity provision of the Federal Credit Union Act, 12 U.S.C. § 1768. By its complaint, the League sought a declaratory judgment that federal credit unions are not liable for hotel occupancy taxes levied by the City of Anaheim in the limited instance where (1) the hotel rooms triggering the occupancy taxed have been contracted for by the federal credit union and (2) the rooms have been paid for directly by the federal credit unions.

Anaheim filed a motion to dismiss for failure to state a claim upon which relief can be granted. The League opposed Anaheim's motion and also filed a concurrent motion for summary judgment based on undisputed facts. A hearing was held on both Anaheim's motion to dismiss and the League's motion for summary judgment. Both parties stipulated that disposition by summary judgment was appropriate. At the district court proceedings, Anaheim conceded that federal credit unions are instrumentalities of the federal government. (*See* Petitioner Appendix A at 3 n.1.)

At the hearing, the district court, the Honorable Edward Rafeedie presiding, announced its tentative ruling to deny Anaheim's motion to dismiss and grant the League's motion for summary judgment. The court's analysis was straight-forward: employees of federal credit unions on credit union business stand in the shoes of their federal credit union employers (under *United States v. New Mexico*, 455 U.S. 720 (1982)) and therefore the levy of an occupancy tax on those employees violated 12 U.S.C. § 1768. At the hearing, Anaheim's primary objection to the court's tentative ruling was practical, not legal. (Petition Appendix F at 5-6.) Upon announcing its tentative ruling, the court heard the City's argument:

Do you wish to be heard for the City?

MR. JOHNSON: Yes, your Honor.

I think one of the things that needs to be addressed if the court is going to grant the motion for summary judgment, is what proof is the hotel going to need to know that this employee is on Federal Credit Union business? Some of the exhibits attached to the complaint were a little contradictory.

THE COURT: That isn't what you have said in your papers. In your papers you said that the entity itself is exempt, not the employee. Now you are trying to change your position here a little bit.

MR. JOHNSON: **What I'm concerned about, your Honor, is implementation of the court's ruling**. How is the hotel going to know when they are looking at a person whether they are there on credit union's business or they are there on personal business?

THE COURT: They have the right to demand proof.

MR. JOHNSON: Okay. . . .

Reporter's Transcript, Petition Appendix F at 5 (emphasis added). Hearing nothing from Anaheim which changed the court's analysis, the court adopted its tentative as its ruling and judgment was entered in favor of the League. (Petition Appendix C.)

Anaheim appealed the judgment to the Ninth Circuit Court of Appeals arguing that the incidence of the tax fell on the employee, not the federal credit union and therefore the tax did not violate 12 U.S.C. § 1768. The appeal was fully briefed by both parties and also by *amici curiae* for both parties. The United States Government filed a brief in support of the League's position. The Assistant Attorney General's statement of the interest of the United States here is noteworthy:

INTEREST OF THE UNITED STATES

> 1. Federal credit unions are instrumentalities of the United States engaged in the performance of important governmental functions. [citation omitted]
> . . . .
>
> In 12 U.S.C. § 1768, Congress has given federal credit unions an affirmative statutory grant of immunity from state and local taxation coextensive with the immunity granted federal instrumentalities under the Constitution and then waived that immunity with respect to "any real property and any tangible personal property . . . to the same extent as other similar property is taxed" by a state or locality. Thus, when a state or local government imposes a tax that is not permitted by 12 U.S.C. § 1768, as the City of Anaheim, California (the City) has done in the case at bar, the tax immunity of a federal instrumentality is violated. ***It is the Federal Government's interest that the tax immunity of its instrumentalities not be violated.***

2. If this Court were to accept the City's position with respect to the tax involved, it could have significant consequences for instrumentalities of the United States other than federal credit unions and for the United States Government itself. The City contends (Br. 11, 20) that it can levy a "transient occupancy tax" where a federal credit union employee is staying at a hotel room contracted for and paid for by a federal credit union while the employee is traveling to conduct official business on the basis that the tax is imposed on the employee. As previously noted, the City does not dispute that a federal credit union is an instrumentality of the United States (CR 9 at 2), nor does it base its authority to levy this tax on an exemption provided in a federal statute. Rather, under the City's position, any state or local taxing authority would be able to impose taxes on rents attributable to hotel rooms contracted for and paid for by the Federal Government that were occupied by federal employees away from home on Government business so long as it characterizes its tax as being a privilege tax imposed on transients. Moreover, as the City points out (Br. 17) "[t]he issue to be resolved here concerns the scope and effect of the Federal and state constitutional immunity from local taxation recognized over the years by courts." Accordingly, the decision reached in this case may well have Government-wide ramifications.

Brief for the United States as Amicus Curiae on behalf of the Appellee, 2-4 (internal footnotes omitted, emphasis added).[2]

The Hawaii Credit Union League joined the League's brief. The National Association of Federal Credit Unions and the Credit Union National Association, Inc., amici also filed briefs in support of the League. The National Institute of Municipal Law Officers filed an amicus brief in support of petitioner City of Anaheim.

The Ninth Circuit affirmed the summary judgment. The Ninth Circuit's decision provides a straight-forward, step-by-step analysis supporting its holding. Beginning with the express terms of 12 U.S.C. § 1768, the court notes the broad tax immunity the Congress conferred on federal credit unions. Petition Appendix A at 2-3. The court then cites to this Court's ruling (in *United States v. New Mexico*, 455 U.S. 720 (1982)) that in order to enjoy the benefit of federal tax immunity a private taxpayer must stand in the shoes of the government. Petition Appendix A at 4-5. The court then reasons that: "The Court's analysis in *New Mexico* compels the conclusion that federal employees are constituent parts of the United States, at least with respect to their professional duties. *See id.* When acting on behalf of the federal government, the congruence between the professional interests of the employee and those of the government is complete."

From this analysis, the court then concludes:

> Because the federal credit unions' employees were attending to credit union business while

2. Although the parties briefed the constitutional tax immunity issue for the Ninth Circuit, the court (appropriately) declined reaching any Constitutional issue since it fully disposed of the matter solely on the basis of Section 1768.

> staying at the Disneyland Hotel in Anaheim, they were "constituent parts" of the credit union and immune from Anaheim's transient occupancy tax under Section 1768.

Petition Appendix A at 5. Anaheim did not seek rehearing or clarification from the court of appeals.

B. Corrections of Misstatements in the Petition

Pursuant to United States Supreme Court Rule 15.1, respondent brings the following misstatements contained in the petition to the Court's attention.

Petitioner Anaheim misstates the scope of the Ninth Circuit's decision as going to constitutionality[3], as opposed to statutory construction. It is, however, unambiguous on the face of the Ninth Circuit's decision that the decision is based on statute (12 U.S.C. §1768), *not* the Constitution. Indeed, the Ninth Circuit specifically says so:

> Independent of the protection afforded by Section 1768, courts have generally considered federal credit unions to be instrumentalities of the federal government and thus immune from state taxation under the supremacy clause. [Citations omitted.] Relying on our decision in *Jesinger v. Nevada Federal Credit Union*, 24 F.3d 1127, 1132

3. Anaheim states: "Whether, under 12 U.S.C. § 1768, the City of Anaheim can constitutionally levy its transient occupancy tax upon employees of federal credit unions when the employee occupies a hotel or motel room on credit union business. . . ." Petition at i. And again: "The issue here is whether the City of Anaheim can *constitutionally* impose its TOT [transient occupancy] tax upon employees of federal credit unions when the employee is on credit union business. . . ." (Petition at 2.)

> (9th Cir. 1994), the National Institute of Municipal Officers ("cities") argues, in an amicus brief, that federal credit unions are not instrumentalities of the United States. [Footnote omitted.] *Because courts have considered the immunity afforded by Section 1768 to be coterminous with that afforded by the supremacy clause, we do not address the cities' argument.* [Citations omitted.] If credit unions would be immune from local taxation were they to be considered an instrument of the federal government, then *regardless of the instrumentality question they are immune from local taxation under Section 1768. See Michigan,* 801 F.2d at 807.

(Petition Appendix A at 3, emphasis added.)

Anaheim also misstates the Ninth Circuit's holding: "The Ninth Circuit holds, in effect, that employees of federal instrumentalities are federal instrumentalities themselves." To the contrary, in its decision, the Ninth Circuit merely held that *when doing the business of the government,* government employees stand in the place of the government:

> The Court's analysis in [*United States v.*] *New Mexico* [, 455 U.S. 720, 738 (1982)] compels the conclusion that federal employees are constituent parts of the United States, *at least with respect to their professional duties. See id. When acting on behalf of the federal government, the congruence between the professional interests of the employee and those of the government is complete.*

(Petition Appendix A at 5, emphasis added.)

Anaheim also misstates the scope of issues adjudicated at the district court and court of appeals levels. Anaheim states:

> The issue of whether the court has to make a distinction if the employee pays for the hotel room with a private check was raised below. Further, another issue raised was if an employee brings his or her spouse, does the spouse pay a TOT [transient occupancy tax] tax?

(Petition at 16.) As the district court's order (Petition Appendix B) and judgment (Petition Appendix C) and the court of appeals' decision (Petition Appendix A) demonstrate, these issues manifestly were not adjudicated below. The were "raised" only in the sense of colloquy during the district court's hearing, *not* by the pleadings. (Petition Appendix F.) They are not ripe for review by this Court as suggested by Anaheim.

REASONS FOR DENYING THE WRIT

This case is about a municipality so desperate for revenues in an era of shrinking public funds that it seeks to circumvent plain statutory tax immunity for federal credit unions by tortured semantics. By its instant petition, Anaheim refuses to heed the sound analysis and unambiguous decisions issued by both the district court and court of appeals which flatly rejected its strained argument. Instead, money is *the* issue.[4] Indeed, it is

---

4. This could not be more clear. Anaheim proclaims:

> The practical effect of the Ninth Circuit's opinion is to permit all federal credit union and federal employees to stay in hotels in any city without paying a TOT [transient occupancy tax] while they are on business. It is estimated that a total of approximately $100,000

(Cont'd)

surprising how forthright Anaheim is. Anaheim admits that it values collecting revenue over complying with Section 1768:

> If the hotel (serving as the statutory tax-collector) hands over the correct sum due the City of Anaheim, the City is not going to object to the hotel's accepting payment from the federal credit union employer.

(Petition at 12.)

Anaheim concedes — as it must — that under Section 1768 it cannot tax a federal credit union. Not able to tax federal credit unions directly, it then tries to make an end run around the plain language of Section 1768. Anaheim argues that it is the *employee* of the federal credit union, not the federal credit union, who is taxed. Anaheim argues that because it is the employee and not the federal credit union who sleeps in the hotel, the occupancy tax does not violate Section 1768. This argument is remarkable. Of course a federal credit union (like a corporation or any other nonnatural person) can act *only* through its employees and agents. Thus, the district court and Ninth Circuit in this case (and this Court in other cases) were absolutely correct in holding that when doing the government's business, the government employee stands in the government's shoes. How could it be otherwise?

To accept Anaheim's strained logic would mean that any

(Cont'd)

> will be lost annually to the City of Anaheim in TOT tax revenue if the Ninth Circuit decision stands.

(Petition at 6.) However, Anaheim is mistaken; it is not the Ninth Circuit decision which circumscribes its ability to tax federal credit unions, but rather Congress in enacting 12 U.S.C. § 1768.

taxing authority could get around the Section 1768 tax immunity by simply wording the tax ordinance[5] or statute such that it was the employee, rather than on the federal credit union, that was taxed. No. This plainly is not what Congress intended. When Congress enacted Section 1768: it intended for federal credit unions to be free from taxation, both legally and practically. The Ninth Circuit Court of Appeal's affirmance of the district court's award of summary judgment is therefore a straightforward application of the statute, is not in conflict with this Court's authority or that of any other Circuit and does not require review by this court.[6]

---

5. Anaheim argues that the Ninth Circuit's decision here "is contrary to the plain language of the Anaheim Municipal Code." Anaheim does not get it. The United States Congress has legislated that cities, states and other local taxing authorities *cannot* tax federal credit unions. It is therefore patently beside the point whether the Ninth Circuit's decision "is contrary to" the City's ordinance. What matters is that application of the ordinance to the federal credit union violates federal statute. *See United States v. State of Michigan*, 851 F.2d 803, 807 (6th Cir. 1988).

6. Rule 10 of the Supreme Court Rules sets forth this Court's guidelines for deciding petitions for writs of certiorari. In pertinent part, Rule 10 provides: "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." Rule 10, Rules of the Supreme Court. In addition to this general statement, Rule 10 also sets forth criteria which "indicate the character of the reasons the court considers:"

> (a) A United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctions such a departure by a lower court, as to call for an exercise of this court's supervisory power; . . .

(Cont'd)

I.

THE NINTH CIRCUIT DECISION HOLDING THAT THE CITY IS A ROUTINE APPLICATION OF THE STATUTE AND THIS COURT'S AUTHORITY.

In its decision, the Ninth Circuit merely and routinely interpreted the scope of the tax immunity conferred on federal credit unions by the Congress under 12 U.S.C. § 1768. *See generally* Petition Appendix A. Although Anaheim tries to add a Constitutional dimension to the Ninth Circuit decision, it simply is not there. *See* discussion at Misstatements section *infra*. The circuit court's analysis is a well reasoned interpretation of Section 1768 which accurately applies principles and precedents established by this Court. There is *no* need, much less a compelling need, for review by this Court.

As part of the Federal Credit Union Act, Congress enacted 12 U.S.C. § 1768. And, as the Ninth Circuit states in its decision,

> 12 U.S.C. § 1768 confers upon federal credit unions broad immunity from federal, state, and local taxation:
>
> The [f]ederal credit unions organized

(Cont'd)

> (c) A state court or a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this court, or has decided an important federal question in a way that conflicts with relevant decisions of this court.

Rule 10. Anaheim, in its Petition, patently fails to establish *any* of these criteria demonstrating a "*compelling*" need for this Court's review.

> hereunder, their property, their franchises, capital, reserves, surpluses, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority, except that any real property and any tangible personal property of such [f]ederal credit unions shall be subject to . . . taxation to the same extent as other similar property is taxed.

(Petition Appendix A at 2-3.) The statute is thus express and unambiguous that federal credit unions are immune from *all* taxation "except that any real property and any tangible personal property of such Federal credit unions shall be subject to . . taxation to the same extent as other similar property is taxed." Accordingly, Anaheim does not — cannot — dispute that federal credit unions are exempt from its transient occupancy tax. But in its apparent desperation to collect the expected $100,000 per year (Petition at 6), Anaheim constructs a legal fiction — nay, a semantic fiction — that if it taxes the *employees* of the federal credit union while they are conducting the credit union's business, it (Anaheim) has somehow jumped outside the reach of Section 1768 immunity. But such semantic gymnastics cannot frustrate the intent of Congress to immunize federal credit unions from local transient occupancy taxes. And so held the Ninth Circuit.

The Ninth Circuit correctly applied this Court's decision in *United States v. New Mexico*, 455 U.S. 720, 102 S. Ct. 1373, 71 L. Ed. 2d 580 (1982). (Petition Appendix A at 4.) In *New Mexico*, this Court considered the propriety of taxing contractors which provided research and other services involving nuclear energy

to the federal government. There the Court specifically discussed the distinction between the government's employees and agents, on the one hand, and independent contractors with the government, on the other. *Id.* at 739-740. And the basis of that distinction was precisely that when a government employee is doing the government's business, there is an identity of interests between the government and the employee; no separation exists. *Id.* However, with an independent contractor, even when the contractor is doing services for the government, the interests never merge and the contractor is *always* separate and distinct from the government. *Id.* As the Court explained: "[T]he contractors remained district entities pursuing 'private ends,' and their actions remained 'commercial activities carried on for profit.' " *Id.* at 739. This Court's distinction between the identity of interests between an employee and the federal employer on the one hand, and the separation of interests between a federal agency and its independent contractor on the other, is unambiguous:

> **In contrast to federal employees,** then, Sandia and its fellow contractors cannot be termed "constituent parts" of the Federal Government. It is true, of course, that employees are a special type of agent, and like the contractors here employees are paid for their services. But **the differences between an employee and one of these contractors are crucial.** The congruence of professional interests between the contractors and the Federal Government is not complete; their relationships with the Government have been created for limited and carefully defined purposes. Allowing the States to apply use taxes to such entities does not offend the notion of federal supremacy.

Id. at 740-41 (emphasis added). *Accord Alabama v. King & Boozer*, 314 U.S. 1, 11, 62 S. Ct. 43, 86 L. Ed. 3d (1941) (holding tax was permissible because it fell upon a contractor, rather than a government agent or employee).

The Ninth Circuit's analysis and application of *New Mexico* in its decision here is straight-forward:

> In *New Mexico*, the Supreme Court, noting "the confusing nature of our precedents," concluded that the essence of the federal government's tax immunity is a prohibition against states assessing taxes "directly upon the United States." 455 U.S. at 733. Immunity from state or local taxation is only appropriate "when the levy falls on the United States itself, or an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned." *Id.* at 735. To avoid paying state or local taxes, "a private taxpayer must actually stand in the Government's shoes." *Id.* at 736 (internal citations omitted). *See also United States v. County of San Diego*, 965 F.2d 691, 697 (9th Cir. 1992) (quoting *New Mexico*).

(Petition Appendix A at 4.) Thus the Ninth Circuit's analysis and use of this Court's precedent is proper and does not invite, much less require, this Court's review.

Anaheim's reliance on *United States v. County of Fresno*, 429 U.S. 452, 97 S. Ct. 699, 50 L. Ed. 2d 683 (1977), also fails to establish that the Ninth Circuit's decision is appropriate for

review by this Court. In *Fresno*, this Court upheld a state property tax levied against forest rangers for their *personal* possessory interest in their homes, which were located on federal property, even when the government reimbursed the employees for the tax. *Fresno* is inapplicable here because the nature of the interest taxed is fundamentally different. In *Fresno*, the Court approved the tax on the government employee because the tax was of a personal nature, as opposed to an employee carrying out an official government function. *Id.* at 466. The personal nature of the interest was even admitted in the government's complaint:

> The government's complaint in this case alleges that the occupancy of the Forest Service houses constitutes part of appellant's "compensation" for services performed — thus, conceding that the occupancy is of *personal benefit* to the employee . . . the Forest Service itself purports to measure the personal benefit of the occupancy to the employee and collects rent in such amount through deductions from the employees paycheck. Since virtually everyone in this country pays for housing for himself or herself and family, common sense compels the conclusion that the occupancy of the house provided by an employer for the employee's family is a *personal financial benefit* to the employee.

Id. (Emphasis added.)

It is well-established that income, or compensation, of government employees is taxable. *See Graves v. New York*, 306 U.S. 466, 59 S. Ct. 595, 83 L. Ed. 927 (1939). Accordingly, contrary to Anaheim's argument, *Fresno* in no way shows that

the Ninth Circuit decision here in any way extends or goes contrary to this Court's precedents. The Petition should be denied.

II.

THERE IS NO CONFLICT WITH THE FOURTH CIRCUIT COURT JUSTIFYING THIS COURT GRANTING CERTIORARI.

Anaheim argues that the Ninth Circuit decision conflicts with the Fourth Circuit opinion in *United States v. Montgomery County*, 761 F.2d 998 (4th Cir. 1985). This is just plain wrong. In *Montgomery County*, the Fourth Circuit held that Montgomery County could constitutionally[7] impose a transient occupancy tax on *outpatients* of the National Institute of Health (the "NIH"). *Id.* at 1002. This has nothing to do with whether **employees** of a federal credit union doing credit union business can be lawfully taxed.[8] The decision in *Montgomery County* does not even discuss *employees* of the NIH, much less render a holding concerning employees of a federal instrumentality. And Anaheim admits as much. Consider its characterization of the Fourth Circuit's holding:

> that a county tax on transients renting hotel

---

7. Plainly the Ninth Circuit decision cannot conflict with the Fourth Circuit's decision in *Montgomery County*; the Ninth Circuit interpreted a statute, the Fourth Circuit the United States Constitution.

8. Anaheim chastises the Ninth Circuit for not discussing *Montgomery County* (Petition at 6) and accuses its decision of being "a mutation" of the Fourth Circuit decision (Petition at 7). This is curious. The reason the Ninth Circuit did not discuss *Montgomery County* is plain; it is inapplicable to the analysis. The Ninth Circuit decision is not a "mutation" of *Montgomery County*; it is a wholly different animal.

> sleeping accommodations fell on the occupants of the sleeping accommodations [*who were outpatients at the National Institutes Of Health ("NIH")*] . . . .

(Petition at 10, emphasis added.) But the Ninth Circuit decision does *not* involve guests of a federal instrumentality, it involves employees. The analogous situation to *Montgomery County* would be if the League were seeking tax exempt status for *nonemployee* guest speakers at the credit union conference. Thus, the Ninth Circuit's holding that federal credit unions can occupy rooms as transients through their employees is therefore entirely consistent with the Fourth Circuit's decision in *Montgomery*. There is no conflict justifying, much less compelling, review by this Court.[9] The Petition should be denied.

III.

IT IS INITIALLY FOR THE DISTRICT COURTS, NOT THIS COURT, TO ADJUDICATE THE APPLICATION OF THE NINTH CIRCUIT HOLDING THROUGH SPECIFIC CASES AND CONTROVERSIES, AS REQUIRED BY ARTICLE III OF THE CONSTITUTION.

In a fundamental misapprehension of the federal court system, Anaheim argues that this Court should grant certiorari because otherwise "cities all over the country will face

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9. Anaheim admits that the Ninth Circuit's decision is in accord with the position of the Comptroller General, 55 Comp. Gen. 1278, 1280-81 (1976). (Petition at 13-14.) Anaheim then tries to distinguish this Opinion depending (again) on the tautological argument that because the federal credit union itself did not sleep in the room, it was the employee personally who was taxed, not the credit union. Again, Anaheim's position would completely eviscerate Section 1768.

uncertainty in the application of their TOT taxes." Anaheim raises various questions it has concerning the practical effects of the Ninth Circuit's ruling.

> The issue of whether the court has to make a distinction if the employee pays for the hotel room with a private check was raised below. Further, another issue raised was if an employee brings his or her spouse, does the spouse pay a TOT [transient occupancy tax] tax? The Ninth Circuit opinion does not directly answer these issues.

(Petition at 16.)

In the first place, the Opinion does answer the questions. The rule is: Federal credit union employees on credit union business are entitled to the tax exemption of 12 U.S.C. § 1768. It's that simple.

But more fundamentally, if Anaheim has lingering questions about the legal consequences of the Ninth Circuit decision, it has the options of seeking an advisory opinion of an appropriate administrative agency or instituting a declaratory relief action in *district* court. However, it is utterly plain that the court of appeals (and most certainly this Court) are not authorized by Article III of the Constitution to idly ruminate on all the ins and outs of a particular court decision.[10] Rather, over a dispute such as this, this Court has *review* jurisdiction only, *not* original

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10. Indeed, without an active, actual dispute between parties there is no justiciable "case or controversy" as required by Article III. The dispute "must be a real and substantial controversy admitting of specific decree of a conclusive character as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Inc. Co. v. Haworth*, 300 U.S. 227, 294, 57 S. Ct. 461, 464, 81 L. Ed. 617 (1937).

jurisdiction (on this record) to rule on the particular, collateral questions Anaheim raises. Accordingly, these lingering questions not only do not — they cannot — justify granting certiorari. The Petition should be denied.

CONCLUSION

The Ninth Circuit's affirmance of the district court's award of summary judgment here is a routine application of the unambiguous provisions of 12 U.S.C. § 1768. The decision raises no conflict with the Fourth (or any other) Circuit. And while the League agrees with Anaheim that the Ninth Circuit addresses an important taxation issue, the Ninth Circuit's decision soundly resolves the issue with a clear, well reasoned analysis consistent with Congressional intent and existing authority. In short, there is *no* reason for this Court to review the decision. The Petition should be denied.

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IN THE

Supreme Court of the United States

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CALIFORNIA CREDIT UNION LEAGUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONERS REPLY BRIEF

I

CORRECTIONS OF MISSTATEMENTS IN THE OPPOSITION

Respondent argues that employees of federal credit unions on credit union business stand in the shoes of their federal credit union employers and therefore the levy of a TOT tax on those employees violates 12 U.S.C. § 1768. (Opposition at 3.) However, where an employee pays for the hotel room with a private check, brings his or her nonemployee spouse as a "guest," or the employee and his nonemployee "guest" spouse and family spend an extra weekend to visit Disneyland, it is questionable whether the employee "stands in the shoes of the federal government" or a federal credit union. Respondent concedes that the Ninth Circuit decision does *not* involve guests of a federal instrumentality, it involves employees. (Opposition at 19.) Respondent thus concedes that nonemployee guests are taxable. It is curious out of all the hotels in Anaheim that Respondent held its conference at the Disneyland Hotel. Respondent does not wish to deal with these hard questions that the City is faced with everyday. Respondent conceded at oral argument before the district court: "We haven't even asked for a declaratory judgment in a reimbursement situation. Because giving the City the benefit of the doubt, we think that might be difficult to track." (Petition Appendix F at 7.) Respondent thus concedes

that in the personal funds situations, the City can tax an employee even if he or she is on business.

Respondent argues that the City seeks an advisory opinion of this Court regarding the above questions in violation of Article III of the Constitution. (Opposition at 20.) This is not true. These questions were raised in the City's papers and oral argument at both the district court and Ninth Circuit's hearings. These questions all relate to whether the employee stands in the government shoes, the issue addressed by the Ninth Circuit opinion.

At the district court hearing, the City's primary objection to the court's ruling was legal, not practical, as claimed by Respondent. (Opposition at 3.) The City's main argument was as follows: ". . . But going to the merits, I would only say that all of the cases that I have cited to the court that dealt with transient occupancy tax, even though it dealt in situations where the employee was on some form of government business, all of those cases held that the tax was on the occupant of the room . . . . [A]ll of the cases that dealt specifically with the transient occupancy tax . . . have held that the tax fell upon the occupant, even when the employee was acting on behalf of the employer, acting on government business. It is the question of whether the legal incident falls, and in those cases they all found it fell on the employee." (Petition Appendix F at 6-7.)

As the United States pointed out in its amicus brief "[t]he City does not dispute that a federal credit union is an instrumentality of the United States . . . . [and] [t]he issue to be resolved here concerns the scope and effect of the Federal . . . constitutional immunity from local taxation . . . ." Brief for the United States as Amicus Curiae on behalf of the Appellee, 3-4. Even the Ninth Circuit recognized the constitutional question raised by this case: "[C]ourts have considered the immunity

afforded by Section 1768 to be coterminous with that afforded by the supremacy clause . . ." (Petition Appendix A at 3.)

Respondent also argues that the Ninth Circuit merely held that when doing the business of the government, government employees stand in the place of the government and thus cannot be taxed. (Opposition at 9.) In *Comptroller v. World Inns* (Md. 1987) 310 Md. 154, 163 n.4, 528 A.2d 477, 481 n.4, the court held that federal employees are not federal agencies or instrumentalities when contracting for the rental of hotel rooms and are subject to state sales tax, citing this Court's decision in *United States v. County of Fresno* (1977) 429 U.S. 452 at 464, 97 S.Ct. 699 at 705, 50 L.Ed.2d 683 at 693, as supporting this position. It is questionable when an employee is sleeping in a hotel bed or eating dinner in the hotel restaurant that he or she is doing the business of the federal government. The outpatients of the NIH were doing the "business" of the NIH but the Fourth Circuit upheld the TOT tax under the following facts: "[T]he National Institutes of Health, if not an arm at least a finger of the United States Government, since 1971 have instituted a policy of providing sleeping accommodations to outpatients under one or more of the programs conducted by the National Institutes. The patients have come to Bethesda, Maryland or its environs for treatment, the elapsed periods of their stays in hotels and motels in the area lasting no more than seven consecutive days. The NIH arranged with a private hostelry, United Inn of America, as an independent contractor, to supply accommodations, with NIH undertaking to meet room costs." *United States v. Montgomery County*, 761 F.2d 998, 999 (4th Cir. 1985).

II.

THE NINTH CIRCUIT DECISION CONFLICTS WITH THE FOURTH CIRCUIT COURT OF APPEALS DECISION IN *MONTGOMERY COUNTY*

The City denies Respondent's claim that it values collecting revenue over complying with 28 U.S.C. § 1768. (Opposition at 11.) The City's position is that stated in *Montgomery County*, 761 F.2d at 1002: "Of course, taxation is an eminently practical matter, and, if the host wants to volunteer to pay the tax, the entity imposing it, here, Montgomery County, is not going to object if the hotelier, serving as the statutory tax-collector, in handing over the correct sum due the County, 'erred' slightly as a formal matter by taking the money from the 'wrong' source."

In this case, the federal credit union employees must pay the TOT tax out of their own personal resources. "As long as a state makes no claim of right to collection from the federal government or its instrumentalities, a state may impose a tax." 75 Ops.Cal.Atty.Gen. 86, 89 (1992) quoting *Keystone Auto Leasing, Inc. v. Norberg* (R.I. 1985) 486 A.2d 613, 615. The City makes no claim of right to collect for the federal credit unions or the federal government, only the employees personally. These employees, however, are federal credit union employees rather than "an arm of the Government." *United States v. New Mexico* (1982) 455 U.S. 720 at 736-37, 102 S.Ct. 1373 at 1384. The legal incidence of the TOT tax thus falls upon federal credit union employees, not upon the federal credit union or federal government directly. Consequently, because the City's

Ordinance does not tax the federal credit unions or federal government directly, the City may apply the tax to federal credit union employees without violating the Supremacy Clause.

The Respondent claims that the City is trying to get around the tax immunity by simply wording the tax ordinance such that it was the employee that was taxed. (Opposition at 12.) This plainly is not what the City intended. When the City enacted its ordinance, its "objective was obviously to tax transients." *Montgomery County*, 761 F.2d at 1001. That Court also stated:

> "There remains for disposition an argument fashioned on the amendment in 1984 of the statute to restate the definition of 'transient' to read: 'Any person who for any period of not more than seven consecutive days actually occupies sleeping accommodations, in any hotel or motel providing sleeping accommodations for which a charge is made.' The definition for a person was revised to: 'A human being.' The NIH readily concede that, from and after the effective date of the 1984 legislation, the tax was due from the room occupants and any arrangement made by the National Institutes to reimburse them would be altogether collateral, not invalidating the power to assess the tax against the room occupant . . . ." *Montgomery County*, 761 F.2d at 1002.

The Respondent argues that the City fails to establish any of the criteria set forth in Rule 10 of the Supreme

Court Rules demonstrating a need for Supreme Court review. (Opposition at 12 n.6.) However, Respondent "agrees with Anaheim that the Ninth Circuit addresses an important taxation issue." (Opposition at 21.) Rule 10, Rules of the Supreme Court states the following reasons are considered by the Court: "(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter .... (c) a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court or has decided an important federal question in a way that conflicts with relevant decisions of this Court." The Ninth Circuit's decision conflicts with *Montgomery County*, 761 F.2d 998, the only federal appellate case to consider TOT taxes.

This important question of federal taxation law affects whether all federal credit union and federal employees can stay in hotels in any city throughout the country without paying a TOT tax while they are on business. It is estimated that a total of approximately $100,000 will be lost annually to the City of Anaheim in TOT tax revenue if the Ninth Circuit decision stands. This case involves a question of exceptional national importance for all cities that depend on this revenue to fund vital local services like police and fire protection. When an employee is robbed in the hotel parking lot, it is the employee, not the employer, who calls the city police department requesting assistance. Even Respondent admits that this is "an era of shrinking public funds . . ." (Opposition at 10.) All cities need revenue for the economic burdens placed on them by transients visiting their cities.

Respondent argues that the decision in *Montgomery County* does not render a holding concerning employees

of a federal instrumentality. (Opposition at 18.) This is just plain wrong and ignores the crucial issue in this case. The TOT tax itself is levied on the 'transient' and "exactly who that has been being the crux of the case." *Montgomery County*, 761 F.2d at 999 n.2. That Court dealt with the issue of "employees" and held that "[t]he outpatients have come and gone in a fashion amply fitting description as transients .... the United States Government which arranges a room ... which is occupied only a day or two at a time by any one visiting *employee* or guest simply does not meet the definition of 'transient.' " *Montgomery County*, 761 F.2d at 1001 (emphasis added). The Fourth Circuit also considered the relevant decisions of this Court in rendering its main holding. "Since the tax falls on the transient, the occupant of the sleeping accommodations, the fact of reimbursement by the United States or one of its agencies does not invalidate it under the supremacy clause. E.g., *United States v. New Mexico*, 455 U.S. 720, 735, 102 S.Ct. 1373, 1383, 71 L.Ed.2d 580 (1982); *Alabama v. King and Boozer*, 314 U.S. 1, 8-9, 62 S.Ct. 43, 45, 86 L.Ed. 3 (1941)." *Montgomery County*, 761 F.2d at 1002. The Ninth Circuit's decision fails to even mention or apply the precedent established by the Fourth Circuit.

Thus, Respondent's claim that the City has constructed a semantic fiction that it taxes the "employees" of the federal credit union while they are conducting the credit union's business to justify its TOT tax, (Opposition at 14), falls in the face of the above holdings by the Fourth Circuit. The City has always relied on the legal fiction that "the tax falls on the transient, the occupant of the sleeping accommodations." *Montgomery County*, 761 F.2d at 1002. This legal fiction is no less important than the Respondent's legal fiction that "a federal credit union (like a corporation or

any other nonnatural person) can act *only* through its employees and agents" (Opposition at 11), or the Ninth Circuit's legal fiction that "federal employees are constituent parts of the United States, at least with respect to their professional duties." (Petition Appendix A at 5.)

The California Attorney General has stated: "A city may levy a transient occupancy tax upon a state employee who, while on state business, contracts for a hotel room and submits payment for the room with a state issued check." 75 Ops.Cal.Atty.Gen. 86, 89 (1992). The California Attorney General after considering the relevant decisions of this Court, including *United States v. County of Fresno* (1977) 429 U.S. 452, 464, 97 S.Ct. 699, 50 L.Ed.2d 683 and *United States v. New Mexico* (1982) 455 U.S. 720, 737, 102 S.Ct. 1373, 71 L.Ed.2d 580, rejected "the argument that the election by a governmental agency to advance the room rental charges incurred by its employees while on official business transmutes a local transient occupancy tax into a direct tax on the government. It is our view, the tax remains on the employee for 'the privilege of occupying a room.' " 75 Ops.Cal.Atty.Gen. 86, 88 (1992).

Federal employees are not federal agencies or instrumentalities. In *United States v. County of Fresno*, *supra*, 429 U.S. at 464, 97 S.Ct. at 705, 50 L.Ed.2d at 693, this Court held that the legal incidence of a state tax fell on a federal employee carrying out governmental business. Nevertheless, *Fresno* held that tax immunity was inappropriate. The *Fresno* Court ruled on the facts presented in that case:

> "The 'legal incidence' of the tax involved in this case falls neither on the Federal Government nor on federal property. The tax is imposed solely on private citizens who work

> for the Federal Government. The tax threatens to interfere with federal laws relating to the functions of the Forest Service *only* insofar as it may impose an economic burden on the Forest Service — causing it to reimburse its employees for the taxes legally owed by them." *United States v. County of Fresno, supra*, 429 U.S. at 464, 97 S.Ct. at 705, 50 L.Ed.2d at 693 (emphasis in original).

Even the Comptroller General's original opinion, 53 Comp.Gen. 69 (1973), which considered the Montgomery County hotel room rental tax (the same tax as in the *Montgomery County* case cited above), held the "transient" was the room occupant, and not the Government, and thus the Government was not taxed directly

CONCLUSION

This case presents a serious taxation issue concerning the constitutionality of TOT taxes invoked in thousands of hotels daily throughout California and the nation. Petitioner respectfully requests that this Court grant Certiorari to review the issue.

DATED: January 22, 1997.

Respectfully submitted,

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No. 96-936

In The

Supreme Court of the United States

October Term, 1996

CITY OF ANAHEIM,

Petitioner,

REPRINTED COPY

vs.

CALIFORNIA CREDIT UNION LEAGUE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The opinion of the Ninth Circuit Court of Appeals is reported at 95 F.3d 30 and is attached to City of Anaheim's Petition as Appendix A. The United States District Court's order denying motion to dismiss and granting summary judgment is attached to the Petition as Appendix B; and the judgment is attached as Appendix C.

Credit Union National Association, Inc. submits this brief as amicus curiae in support of respondent, California Credit Union League.

STATUTORY PROVISIONS INVOLVED

The principal statutory provision involved in the case is 12 U.S.C. § 1768, a section of the Federal Credit Union Act, the applicable provision reading as follows:

> The federal credit unions organized hereunder, their property, their franchises, capital, reserves, surpluses, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property of such federal credit union shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed.

The statute is set forth in full as Petitioner's Appendix D.

STATEMENT OF INTEREST OF CREDIT UNION NATIONAL ASSOCIATION, INC.

Credit Union National Association, Inc. appears as amicus curiae with the written consent of both parties, given in letters which have been filed with the Clerk of this Court. Credit Union National Association, Inc. is a national trade association representing the interests of approximately 90 percent of the more than 12,500 federal and state chartered credit unions operating in the United States with approximately 67,000,000 consumer members.

Federal credit unions are non-profit cooperative associations of individuals organized under the Federal Credit Union Act "for the purpose of promoting thrift among [their] members and creating a source of credit for provident or productive purposes." 12 U.S.C. § 1752(1). Congress encouraged the success of the credit union movement in order to bring financial services to people who were unable to obtain such services elsewhere; and to foster the development of a system of financial cooperatives that would serve as a valuable alternative to the traditional for-profit banking system. In exchange for the tax exemption, credit unions accept limited markets, have limited investment and loan authority, have democratic control, rely extensively on the service of volunteer directors and are required to maintain adequate deposits in their federal deposit insurance fund.

Funds needed to pay real property and tangible personal property taxes come from reserve cushions maintained by the credit union. The imposition of additional taxation would require maintenance of additional reserves. This would necessarily reduce the earning that could be paid to credit union members on their deposits and would increase the interest rates that would need to be charged on loans to members. Credit unions would be compelled to seek only the most advantageous accounts, offer

only the most economical services and make investments that carry more risk in order to keep the reserve cushion adequate. This would, in essence, move the credit union system toward the traditional for-profit banking system, rather than providing an alternative to it. Currently, credit unions are allowed to promote thrift and provide the source of credit that Congress envisioned. The tax exemption is, at least in part, responsible for the movement's healthy financial condition, particularly in relation to profit-driven banks and savings and loan associations.

On behalf of the federal credit unions, Credit Union National Association, Inc. is concerned that this attempt to circumvent the long standing tax-exempt status of federal credit unions, established by federal authority, could open the doors to other meritless attacks on these non-profit institutions by state and local taxing authorities.

SUMMARY OF ARGUMENT

The Ninth Circuit decision correctly applies 12 U.S.C. § 1768 in finding that federal credit union employees, on credit union business, are constituent parts of the federal instrumentality, and are immune from all state and local taxation unless for real property or tangible personal property. The legal incidence of Petitioner's transient occupancy tax falls on the federal credit union itself when its employees stay at Petitioner's hotels on official federal credit union business. Therefore, imposition of the tax is impermissible as it is an attempt to circumvent the federal tax exemption of federal credit unions by imposing a local tax on a federal instrumentality. Furthermore, the decision is not in conflict with the Fourth Circuit court, and the decision clearly answers the questions raised in this case with regard to the exemption. Therefore, the Petition should be denied.

ARGUMENT

I.

THE NINTH CIRCUIT DECISION CORRECTLY APPLIES THE STATUTE AND RECOGNIZES THE INTENTION OF CONGRESS THAT FEDERAL INSTRUMENTALITY EMPLOYEES, WITH RESPECT TO THEIR PROFESSIONAL DUTIES, ARE ENTITLED TO TAX-EXEMPT STATUS.

The City requests that the Petition be granted because the Ninth Circuit decision is "contrary to the plain language of the Anaheim Municipal Code." The City fails to recognize that most importantly, the decision is consistent with the plain language of 12 U.S.C. § 1768:

> The federal credit unions organized hereunder, their property, their franchises, capital, reserves, surpluses, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property of such federal credit union shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed. Federal Credit Union Act, Section 122, 12 U.S.C. 1768 (amended by 51 Stat. 4, Dec. 6, 1937).

Congress declared the nation's credit unions exempt from taxation in 1937, and has since deliberated, reviewed and reaffirmed that declaration. Revenue Act of 1951, P.L. 82-183,

65 Stat. 452. Clearly Congress intended to afford broad exemption and in fact enumerated only two exceptions to the exemption: real property tax and tangible personal property tax. Congress certainly could have communicated any intention or desire to also exclude other taxes, but did not.

The motive behind an attempt to water down the effect of a clearly worded and intentioned federal tax exemption by arguing that the wording or intentions of the City's ordinance are somehow more deliberate is suspect. The apparent preeminence of local revenue collection, albeit to fund local services, at the expense of impugning federal law and congressional intent is unfortunate. Perhaps most disturbing in this instance is that the party being attacked, the federal credit union, is an entity of the utmost importance to millions of Americans. Any erosion of the exemption would jeopardize the resilience, self-sufficiency and essential cooperative nature of credit unions, the most consumer-oriented of financial institutions.

Petitioner recognizes that in *United States v. New Mexico*, 455 U.S. 720 (1982), independent government contractors were found not to be immune from taxation by virtue of their provision of contractual research and other service to the federal government. The Court in *New Mexico* stated that the independent contractors could not be termed "constituent parts of the Federal Government." The Court specifically stated that this is "in contrast to federal employees." The Ninth Circuit court in this case also recognized "crucial" differences between employees and independent contractors.

Finding that an independent contractor is not immune as an instrumentality of the federal government does not lead to Petitioner's conclusion that the Ninth Circuit must believe federal employees to be federal instrumentalities in and of themselves. The critical issue in this instance is that the federal

credit union employees are standing in the shoes of the federal instrumentality. They need not be considered federal instrumentalities themselves to be immune, only to be acting on the federal instrumentalities' behalf.

In fact, in this case it can be no other way. At issue is occupancy of a hotel sleeping room. Petitioner would like to believe that the nature of the City ordinance, as it is drafted, makes it impossible for a federal instrumentality, that has no physical body with which to occupy a bed, to avoid the tax. To accept Petitioner's argument means the drafters have successfully fashioned a tax that can not be avoided, even when there is clear Congressional intent to provide such exemption. It is difficult to understand how the City might believe that Congress intended to leave such room for skillful drafters to avoid the clear meaning of the federal statute.

II.

THE NINTH CIRCUIT DECISION IS NOT IN CONFLICT WITH THE FOURTH CIRCUIT COURT.

At the crux of the Ninth Circuit decision is the fact that the occupants of the sleeping rooms were "constituent parts" of the federal instrumentality, the credit union.

The occupants in the Fourth Circuit case of *United States v. Montgomery County,* 761 F.2d 998 (4th Cir. 1985) cited by Petitioner were not employees, or even independent contractors of the organization in question. They were simply outpatient clients, in no way responsible for the organization carrying out its governmental duties or obligations. Clearly, they were not constituent parts of the organization.

One must certainly differentiate then, between a decision

concerning such individuals and federal credit union employees where the federal credit union relies on the physical presence of its constituent part employees to carry out its federal instrumentality role. Petitioner itself states that *Montgomery County* is the "only decision on point by another circuit." Since that decision is in fact not on point at all, there exists no conflict justifying Petitioner's request.

III.

THE NINTH CIRCUIT DECISION ANSWERS CLEARLY THE QUESTIONS RAISED IN REGARD TO THE EXEMPTION.

Petitioner is correct that the questions raised in this case are important. But Petitioner fails to recognize that the questions raised have been answered.

The Ninth Circuit decision is clear in stating that federal credit union employees are constituent parts of their federal instrumentality credit union employer while attending to credit union business. The decision is also clear that the employees are then immune from the transient occupancy tax by virtue of Section 1768 of the Federal Credit Union Act. The decision exhausts the questions raised by this case and the raising of auxiliary issues does not support a petition for certiorari.

CONCLUSION

Because the Ninth Circuit decision correctly applies 12 U.S.C. § 1768 and recognizes the intention of Congress that federal instrumentality employees, with respect to their professional duties, are entitled to tax-exempt status, and because the decision is not in conflict with the Fourth Circuit Court and because the decision clearly answers the questions raised in

regard to the exemption, the Petition for Writ of Certiorari should be denied.

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Respectfully submitted,

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